PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

HUGO ALEJANDRO VILLEGAS DURAN,

Petitioner,

—v.—

JOHANA IVETTE ARRIBADA BEAUMONT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Supreme Court resolve the circuit split between the Second Circuit, on the one hand, and the Fourth and Tenth Circuits, on the other hand, regarding whether a foreign sovereign's statement of its own law, provided pursuant to a duly-ratified treaty, is entitled to deference?

2. Is Supreme Court review warranted to correct the Second Circuit's disregard of this Court's precedents requiring deference to a foreign sovereign's authoritative interpretation of its own domestic law?

3. Is Supreme Court review warranted because the uncertainty caused by the circuit split could hamper international efforts to combat inter-country child abduction?

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OPINIONS BELOW

The transcript of the August 31, 2006 district court hearing at which the court determined that Petitioner's parental rights were not rights of custody was not published and is excerpted here as Appendix B. The transcript of the October 26, 2006, district court hearing at which the court denied Petitioner's motion to reconsider was not published and is excerpted here as Appendix C. The opinion of the United States Court of Appeals for the Second Circuit was published in the Federal Reporter at 534 F.3d 142 and is reprinted here as Appendix A. The order of the United States Court of Appeals for the Second Circuit denying the petition for reconsideration and rehearing *en banc* was not published and is reprinted here as Appendix D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254. The Second Circuit's opinion was issued on July 18, 2008. *See* Appendix A. The petition for reconsideration and rehearing *en banc* was denied on September 15, 2008. *See* Appendix D.

STATEMENT OF THE CASE

Petitioner timely filed this action in the United States District Court for the Southern District of New York on July 25, 2006, seeking return of his daughter pursuant to the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 *et seq.* (2000) which implements the Convention on the Civil Aspects of International Child Abduction (done at the Hague on October 25, 1980), T.I.A.S. No.

11,670, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (Mar. 26, 1986) (the "Hague Convention" or the "Convention").[1] The Honorable Stephen C. Robinson heard argument on July 31, August 15, August 31 and October 26, 2006. At the hearing on August 31, 2006, the district court denied Petitioner's motion for return of the child to Chile. The Court erroneously determined that Petitioner did not have rights of custody but instead only a right of access, as those terms are defined by Article 5 of the Hague Convention. *See* Appendix B. At the hearing on October 26, 2006 the district court denied Petitioner's motion for reconsideration. *See* Appendix C.

Petitioner timely appealed to the United States Court of Appeals for the Second Circuit, which heard oral argument in the case on March 4, 2008. Reviewing the issues of law *de novo*, the court ruled on July 18, 2008 that Petitioner does not have rights of custody over his daughter and therefore affirmed the judgment of the district court. *See* Appendix A. The Honorable Richard C. Wesley dissented in a separate opinion. *See id.* at 14a. Petitioner moved for reconsideration and rehearing *en banc*, and the Second Circuit denied this motion on September 15, 2008. *See* Appendix D.

THE PARTIES

Petitioner, Hugo Alejandro Villegas Duran ("Mr. Villegas"), is a twenty-nine-year-old resident citizen of Chile. He is the natural father of Valentina, the child who is the subject of this action. *See* Appendices A, H. The Respondent, Johana Ivette Arribada

[1] Both Chile and the United States are signatories to the Hague Convention. *See* Appendix A at 6a.

Beaumont, gave birth to Valentina on April 22, 2001. After the birth of Valentina, Mr. Villegas and Respondent lived together in Quillota, Chile, with Mr. Villegas' parents for the first three years of Valentina's life. During this time, Mr. Villegas developed a close relationship and emotional bond with Valentina and supported his family financially.

In or around April 2004, Mr. Villegas and the Respondent separated. The Respondent moved out of Mr. Villegas' parents' home to another residence three blocks away, taking Valentina with her. She later moved with Valentina to Santiago, Chile. Mr. Villegas continued to maintain a relationship with Valentina and to support her financially, including paying for Valentina's medical examinations.

On September 30, 2004, the Chilean Minors' Court of Quillota granted Mr. Villegas' petition for regulation of his right to a direct paternal relationship with Valentina as authorized by Chilean law. Mr. Villegas continued to provide his daughter with emotional and monetary support, fulfilling his duty to maintain "a direct, permanent relationship" with his daughter as imposed on him by Section 229 of the Chilean Civil Code.

On June 10, 2005, Respondent applied to the Eighth Minors' Court of Santiago for permission to travel to the United States with Valentina for a period of five months. Such permission was required because, under Chilean law, the Respondent does not have sole custody of Valentina and Mr. Villegas did not consent to the removal of his daughter from Chile.

Under Chilean law, a parent who has not been granted sole custody by a Chilean court may not remove his/her child from Chile without either the

consent of the other parent or a court authorization. The Chilean Civil Code provides as follows:

> Should the custody of a child have not been granted by the judge to either parent or to a third party, the minor may not exit the country without the authorization of both parents, or from the one who had recognized him.
>
> Upon the custody being granted to either parent or to a third party, a child may only exit the country with the authorization of the person to whom his/her custody had been granted.

LAW N° 16,618 - MINORS LAW, TITLE III, JUVENILE COURT SYSTEM - ORGANIZATION AND POWERS, Article 49 ("Article 49").

Respondent made an application under Article 49, and on July 19, 2005, the Chilean court issued an order authorizing Respondent to travel to the United States with Valentina for a period of three months, after which she was obligated by Chilean law to return Valentina to Chile. The court further required Respondent to submit a bond of $2,500. The order was designed to prevent Respondent from abducting Valentina, and thereby short-circuiting ongoing custody proceedings in Chile.

On August 3, 2005, Respondent and Valentina departed Chile for the United States. Three months later, on November 3, 2005, the travel period authorized by the Chilean court expired and Respondent was required by law to return Valentina to Chile. Notwithstanding the safeguards imposed by the Chilean court, however, Respondent did not return to Chile, and remains with Valentina in the United

States in violation of Mr. Villegas' custody rights and the order of the Chilean court. Respondent's abduction of Valentina has halted ongoing custody proceedings in Chile, which have not yet been resolved and are on hold due to Respondent's abduction of Valentina.

STATEMENT OF THE CHILEAN CENTRAL AUTHORITY

The dispositive issue in this case is whether Mr. Villegas' rights vis-à-vis his daughter are rights of custody or only a right of access under Article 5 of the Hague Convention.[2] Since Mr. Villegas and Respondent were never married, the issue turns on whether, under Chilean law, unmarried, separated parents share custody rights absent a court order. *See* Appendix A at 16a (Wesley, J. dissenting). If the Chilean government is correct that Mr. Villegas' rights under Chilean law amount to rights of custody, then the U.S. federal courts have jurisdiction to order Valentina's return to Chile pursuant to ICARA.

The Hague Convention requires each contracting state to "designate a Central Authority to discharge the duties which are imposed by the Convention." Hague Convention, Art. 6. "[T]he application of the Convention, both in its broad outline and in the great majority of cases, will depend on the working of . . . the Central Authorities." Elisa Perez-Vera, *Explanatory Report: Hague Conference on Private*

[2] The Convention provides that classification of parental rights is based on the law of the state in which the child was habitually resident prior to removal, in this case Chile. *See* Appendix A at 5a-6a.

International Law, in 3 Acts and Documents of the Fourteenth Session 426 (1980) ("Perez-Vera Report") ¶ 45.[3] Each country's Central Authority is to take "all appropriate measures . . . to provide information of a general character as to the law of their State in connection with the application of the Convention." Hague Convention, Art. 7(e). A Central Authority may provide a court in the abducted-to nation with "a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention." *Id.* Art. 15.[4]

In this case, the Chilean Central Authority's statement of the relevant Chilean law and its applicability to this case was submitted to the district court, and was part of the record on appeal to the Second Circuit. The Chilean Central Authority concluded that, although the Respondent had physical custody of Valentina, both parents retained rights of custody:

> The "right of custody" alluded [to] by the [Hague] Convention, in [Chilean] legislation . . . is linked [to] and includes the following rights: the "custody," the "personal care of the minor," the "guard[,]" the "patria potestas," and the "right to authorize the minor[s] exit of the country," which are regulated in different articles contained in different

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[3] The Perez-Vera Report is an authoritative source for interpreting the Hague Convention. *See Blondin v. Dubois*, 189 F.3d 240, 246 n.5 (2d Cir. 1999).

[4] A removal is wrongful under the Hague Convention if (1) it is in breach of rights of custody under the law of the State in which the child was habitually resident prior to the removal, and (2) those rights were actually exercised at the time of the removal. *See* Hague Convention, Art. 3; *see also Blondin*, 189 F.3d at 245.

> Laws. . . . the '*right of custody*,' to which the [Hague] Convention . . . refer[s] . . . *is shared* by [the father Hugo] Villegas and [the mother Joanna] Arribada. . . . *both parents have the guard and custody of their daughter . . . [and] decisions of major importance must be adopted by both parents* [under Chilean law].

Appendix E at 34a-35a (emphasis added) (some internal quotation marks omitted).

BRIONES ARTICLE[5]

To confirm the reasonableness of the Central Authority's statement of Chilean law, Mr. Villegas presented to the district court an article (Appendix F) by Professor Bernardita Briones Maira, the former Chief Attorney in the Office of International Procedure of the Chilean Central Authority (Appendix G), confirming that the Central Authority's statement of Chilean law is correct, *i.e.*, that under Chilean law, the default rule for unmarried parents is joint custody.[6] However, the district court (and the panel majority) completely ignored this evidence as well. *See* Appendices A, C.

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[5] "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1.

[6] "[T]he principle of equality of the parents and of the superior interest of the child means that *when they are separated, the guardianship of their children is shared, since both have the right to decide on the most important matters that affect the life of the child.*" Appendix F at 65a. (emphasis added).

DISTRICT COURT DECISION

The district court did not analyze the authoritative statement of Chilean law by the Chilean Central Authority or provide any reason for rejecting its conclusions. Rather, the district court *completely ignored* the Chilean government's proffer regarding Chilean family law. *See* Appendix B. Indeed, the district court made no effort whatsoever to construe the relevant Chilean statutes, and looked solely at parental behavior in determining whether Mr. Villegas had rights of custody. *See id.*

SECOND CIRCUIT MAJORITY OPINION

Petitioner timely appealed to the United States Court of Appeals for the Second Circuit, which heard oral argument on March 4, 2008. On July 18, 2008, by a vote of 2-1, the Second Circuit affirmed the district court. *See* Appendix A. Rather than defer to the interpretation of Chilean statutes proffered by the Chilean government pursuant to a duly ratified treaty (and confirmed by the former Chief Attorney in the Office of International Procedure of the Chilean Central Authority), the majority attempted to construe the Chilean civil code on its own. The majority reasoned that Article 225's granting of "personal care" to the mother was equivalent to a grant of sole custody and that Article 49's recognition of shared custody merely provided a *ne exeat* right to Mr. Villegas. *See id.* at 8.

In rejecting the Chilean government's statement of Chilean law, the majority stated that the district court had "[r]easons" for failing to defer to the Chilean Central Authority. However, the only "reason" identified by the majority is that "the Central

Authority's conclusion that joint custody exists under Chilean law as a default rests almost exclusively on the *ne exeat* right. We have already stated that as we interpret the Hague Convention, this veto power does not confer rights of custody." Appendix A at 9a-10a (citing *Croll v. Croll*, 229 F.3d 133, 142 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001)).

In other words, the Second Circuit majority ruled that the district court was free to ignore the Chilean government's view as to the legal status of unmarried parents under Chilean law, because the Second Circuit previously had decided that, under Hong Kong law, when married parents are separated pursuant to an order awarding sole custody to one parent, the non-custodial parent's *ne exeat* right does not amount to a right of custody under the Hague Convention. *See Croll*, 229 F.3d at 142.

JUDGE WESLEY'S DISSENT

The Honorable Richard C. Wesley dissented for two reasons: First, "it is not clear from the district court's opinion whether it gave *any* deference at all to the Central Authority's interpretation of Chilean law." Appendix A at 17a. Second, Judge Wesley correctly observed that—contrary to the majority's conclusion—the Central Authority's interpretation of Chilean law was based on more than Article 49's *ne exeat* right. "[T]here is language in the affidavit [of the Chilean Central Authority]—such as 'the decisions of major importance' must be adopted by both parents—which would seem to favor a finding of

joint custody." *Id.* (some internal quotation marks omitted).[7] Judge Wesley concluded:

> The bottom line here is that a child has traveled to the United States with her mother and has not returned to Chile as earlier promised. Thousands of miles and two distant and different legal system separate the child from her father. *An international accord provides the substantive and procedural mechanisms to resolve the dispute. Adherence to its provisions and careful attention to rights given a parent under Chilean law are central to a fair and just resolution of the dispute.* We would expect the same of a Chilean court if a child from the United States were taken there by her mother and failed to return. I would ask for that same careful attention here and therefore I respectfully dissent.

Appendix A at 19a-20a (emphasis added).

[7] Judge Wesley also correctly observed that the majority misapplied its prior decision in *Croll*: "*Croll* undoubtedly holds that a *ne exeat* clause cannot convert rights of access into rights of custody in the context of an explicit judicial determination of the respective rights of the parents. However, in my mind, this does not foreclose Appellant's argument that a statutorily enshrined *ne exeat* clause may be evidence of a legal regime's recognition of shared 'rights of custody' in the absence of any judicial determination." Appendix A at 15a.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE SUPREME COURT SHOULD GRANT REVIEW TO RESOLVE THE CIRCUIT SPLIT OVER WHETHER DEFERENCE TO A FOREIGN SOVEREIGN'S VIEW OF ITS DOMESTIC LAW IS PARTICULARLY APPROPRIATE IN HAGUE CONVENTION CASES

As Judge Wesley correctly observed, the decision of the panel in this case contradicts the "precedent[s] of sister circuits suggesting that such deference [to a foreign sovereign's statement of its own law] is particularly favored in the context of determining custody rights under the Hague Convention." Appendix A at 18a.[8] Specifically, the Second Circuit's opinion in this case creates a circuit split with the Courts of Appeals for the Fourth and Tenth Circuits.

In *Navani v. Shahani*, 496 F.3d 1121 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 1232 (2008) which involved the abduction of an English child to the United States, the Tenth Circuit held that an English court's determination of English law was entitled to deference based on principles of comity:

> Although the Full Faith and Credit Clause does not require us to recognize judgments, such as the new custody order, which are rendered in foreign countries, the new cus-

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[8] Federal district courts, as well as Courts of Appeals, generally defer to a foreign Central Authority's interpretation of foreign law. *See, e.g., Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1277-78 (N.D.Ga. 2004) (relying on Argentine Central Authority's classification of *patria potestas* as a right of custody); *Currier v. Currier*, 845 F. Supp. 916, 921 (D.N.H. 1994) (deferring to German Central Authority's interpretation of German law).

> tody order should be given effect in American courts for two reasons. First, *general principles of comity normally counsel giving "considerable deference" to a foreign judgment. See Hilton v. Guyot*, 159 U.S. 113, 163, 16 S. Ct. 139, 40 L. Ed. 95 (1895) ("The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.' "). *The English family court's interpretation of its domestic law*—that Navani has always possessed rights of custody over Jivan and that Shahani breached those rights of custody by wrongfully retaining Jivan in the United States—*is therefore entitled to our respect.*

496 F.3d at 1128 (some citations omitted) (emphasis added). The court reviewed both the policies underlying the Hague Convention, as well as caselaw to support its holding that deference to the English court order was appropriate.

The primary purpose of the Hague Convention is to prevent conflicting custody orders from different jurisdictions. "Granting [respondent] the relief she seeks would create the evil that the Hague Convention was intended to prevent: dueling custody orders issued by separate national courts." *Id.* at 1130; *see also Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003), *cert. denied*, 540 U.S. 1068 (2003) ("Though we are obviously not bound by a decision from the House of Lords, judicial opinions of our

sister signatories to the [Hague] Convention are entitled to considerable weight") (citing *Air France v. Saks*, 470 U.S. 392, 404, 105 S. Ct. 1338 (1985)) (internal quotation marks omitted).[9] However, in this case, the Second Circuit majority concluded that the "removal of the child from Chile, although in violation of a lawful order from a Chilean court, did not breach rights of custody and was therefore not 'wrongful' under the Hague Convention," the view of the Chilean government to the contrary notwithstanding. Appendix A at 12a.

The Second Circuit failed to afford the Chilean government the appropriate deference due to it under the Hague Convention—a level of deference recognized and endorsed by two other federal circuits and numerous federal district courts. Proper deference to a foreign central authority's statement of law is implied in the structure of the Hague Convention itself, and has been endorsed by the President and Congress. *See* ICARA.

Supreme Court review is required to harmonize the jurisprudence of the Courts of Appeals.

[9] It is of no consequence that the *Navani* and *Fawcett* courts deferred to foreign court orders, whereas this case involved a foreign administrative agency's statement of foreign law. Under the Hague Convention, rights of custody may arise "by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." *Gitter v. Gitter*, 396 F.3d 124, 130 (2d Cir. 2005) (Katzmann, J.). Under the Convention, a Central Authority may provide a court in the abducted-to nation with "a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention." Hague Convention, Art. 15.

II. THE SUPREME COURT SHOULD GRANT REVIEW TO CORRECT THE SECOND CIRCUIT'S DISREGARD FOR THIS COURT'S REQUIREMENT OF SHOWING DEFERENCE TO A FOREIGN SOVEREIGN'S INTERPRETATION OF ITS OWN LAW, ESPECIALLY WHERE THE STATEMENT WAS PROVIDED PURSUANT TO A DULY-RATIFIED TREATY

As Judge Wesley correctly observed in his dissent, "it is not clear from the district court's opinion whether it gave *any* deference at all to the Central Authority's interpretation of Chilean law. Indeed, the district court did not even mention the affidavit [of the Chilean Central Authority] in justifying [its] determination that Appellant had no custody rights." Appendix A at 17a (emphasis in original).

This Court has held that a foreign sovereign's statement of its domestic law is entitled to deference. *See United States v. Pink*, 315 U.S. 203, 220 (1942). In *Pink*, this Court was called upon to decide whether a property nationalization decree enacted in 1918 by the Bolshevik government applied extraterritorially to property held in the United States. *See id.* at 217-22. The Court referenced the 1933 "Litvinov Assignment," an exchange of letters between Maxim Litvinov, People's Commissar for Foreign Affairs, and President Franklin Delano Roosevelt, in which the Soviet Government pledged not take legal measures in U.S. courts to enforce any purported right to property of Russian nationals, and assigned its rights to such property to the U.S. government *See id.* at 212. The Court explained that "title obtained under the Litvinov Assignment depends on a correct interpretation of Russian Law." *Id.* at 217.

To determine the content of Russian Law, this Court gave great weight to the following interpretation provided by the Soviet government itself:

> The People's Commissariat for Justice of the R. S. F. S. R. certifies that by virtue of the laws of the organs of the Soviet Government all nationalized funds and property of former private enterprises and companies, in particular by virtue of the decree of November 28, 1918 (Collection of Laws of the R. S. F. S. R., 1918, No. 86, Article 904), the funds and property of former insurance companies, constitute the property of the State, irrespective of the nature of the property and irrespective of whether it was situated within the territorial limits of the R. S. F. S. R. or abroad.

Id. at 219-20 (quoting the Official Declaration of the Commissariat for Justice of the R.S.F.R., dated November 28, 1937).

The Court found that this authoritative statement of Russian law by the appropriate organ of the Soviet government conclusively resolved the question of whether the 1918 decree applied extraterritorially to Russian assets in the United States. *See id.* at 220. The Court found that "the Commissariat for Justice has power to interpret existing Russian law [and therefore] this official declaration is conclusive so far as the intended extraterritorial effect of the Russian decree is concerned." *Id.*; *accord United States v. New York Trust Co.*, 75 F. Supp. 583, 586 (S.D.N.Y. 1946) ("Additional interpretations issued by the Commissariat of Justice . . . reaffirm the above quoted interpretation of the scope of the

nationalization decree. Any other interpretation is unwarranted.").[10]

In *Pink*, as in this case, the political branches had committed the United States to a process for resolving international disputes—a process which could call upon the U.S. judiciary to interpret foreign law. This Court wisely held that, in such circumstances, deference to a foreign sovereign's official interpretation is conclusive.

Deference to a foreign sovereign's interpretation is particularly appropriate in the context of international treaties. *See Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S. Ct. 922, 926 (1961); *see also Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933) ("In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter, and to their own practical construction of it. And in resolving doubts *the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight.*") (citations omitted) (emphasis added); *Nielson v. Johnson*, 279 U.S. 47, 52 (1929) ("When [treaties'] meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter and to their own practical construction of it.");

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[10] Unlike the Second Circuit in this case, the Courts of Appeals have generally followed the Supreme Court's guidance on this issue. *See, e.g., In re Oil Spill by the Amoco Cadiz off the Coast of France March 16, 1978*, 954 F.2d 1279, 1312 (7th Cir. 1992) ("Courts of this nation routinely accept plausible constructions of laws by the agencies charged with administering them. . . . Giving the conclusions of a sovereign nation less respect than those of an administrative agency is unacceptable.").

Charleston v. Kelly, 229 U.S. 447, 468 (1913) ("A construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight."); *see also Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 490 (D.N.J. 1999) ("[C]ourts generally give great weight to a signatory nation's interpretation of a treaty."); *Matter of Extradition of Rabelbauer*, 638 F. Supp. 1085, 1087-88 (S.D.N.Y. 1986) (Austrian Federal Ministry of Justice's interpretation of a treaty provision was entitled to great weight); Antonin Scalia, "Constitutional Relevance of Foreign Court Decisions," Discussion with Justices Scalia and Breyer at the American University Washington College of Law, January 13, 2005 ("[T]he object of a treaty being to come up with a text that is the same for all the countries, [American courts] should defer to the views of other signatories, much as [they] defer to the views of agencies—that is to say if it's within [the] ball park, if it's a reasonable interpretation, though not necessarily the very best.").[11]

In *Kolovrat*, this Court overturned a decision of the Oregon Supreme Court interpreting the Treaty of Commerce between the Principality of Serbia and the United States of America, 22 Stat. 963 (1881) ("Serbia Treaty"). *See* 366 U.S. at 190 n.4. The Oregon Supreme Court had interpreted the reciprocity provision of the treaty narrowly, so as not to trump an Oregon statute prohibiting non-U.S. citizens from inheriting property. In briefing the case, the governments of the United States and Yugoslavia provided the Court with "diplomatic notes exchanged

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[11] Available at http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument.

between the responsible agencies of the United States and of Yugoslavia, to the effect that the 1881 Treaty, now and always, has been construed as providing for inheritance by both countries' nationals without regard to the location of the property to be passed or the domiciles of the nationals." *Id.* at 194-95. Although this Court found that the Oregon Supreme Court's interpretation was "plausible," it reversed the judgment based on the "great weight" it afforded to the interpretation of the Yugoslav and American government agencies. *See id.* at 194 ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

In this case, the reasonableness—indeed, the correctness—of the Chilean Central Authority's statement is confirmed by the article (Appendix F) by Professor Bernardita Briones Maira, the former Chief Attorney in the Office of International Procedure of the Chilean Central Authority (Appendix G), which was submitted to the district court and was part of the record on appeal to the Second Circuit. Furthermore, the Hague Convention, unlike the Serbia Treaty, specifically provides for states party to establish a mechanism through which a foreign sovereign is to provide an American court with an interpretation of its domestic law. *See* Hague Convention, Arts. 7, 15.

Nevertheless, the Second Circuit affirmed a district court decision that *completely ignored* a foreign sovereign's reasonable interpretation of its domestic law, provided to the court pursuant to a treaty signed by the President and ratified by the Senate. The Second Circuit majority not only failed to give appropriate deference to the Chilean gov-

ernment's considered view of its own domestic law, it also failed to adhere to this Court's requirement of showing deference to a foreign sovereign's view of its own law. *See Kolovrat*, 366 U.S. at 194; *Pink*, 315 U.S. at 220; *Factor*, 290 U.S. at 294-95; *Charleston*, 229 U.S. at 468.

The Supreme Court should grant review.

III. THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE RESOLUTION OF THIS ISSUE WILL BENEFIT THOUSANDS OF CHILDREN WHO ARE VICTIMS OF INTERNATIONAL ABDUCTION.

International child abduction is a serious problem affecting thousands of children. According to the Hague Conference on Private International Law ("Hague Conference"), in 2003, at least 1,784 children were involved in the 1,259 applications made under the Convention.[12] The United States alone handled 466 Hague Convention applications in 1999 (the last year for which data appears on the Hague Conference's website).[13] According to its 2006 Annual Report, the National Center for Missing and Exploited Children ("NCMEC") estimates that it was handling 1,850 international abduction cases.[14]

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[12] Hague Conference, "A Statistical Analysis of Applications Made in 2003 Under the Hague convention of 25 October 1980 on the Civil Aspects of International Child Abduction," 2007 Update, available at http://www.hcch.net/upload/wop/abd_pd03e1_2007.pdf.

[13] *See* Hague Conference, "Statistical Analysis Part II, National Report of the United States," available at http://hcch.e-vision.nl/upload/stats_us.pdf.

[14] *See* NCMEC, 2006 Annual Report, available at http://www.missingkids.com/en_US/publications/NC 171.pdf.

By ratifying the Hague Convention, 81 countries have committed themselves to an orderly process for resolving the problem of international child abduction.[15] The United States bound itself to comply with this process when the President signed, and the Senate ratified, the Hague Convention, and the political branches enacted ICARA. A key part of that process is that each state party to the Convention has the opportunity to inform a court in an abducted-to state about the nature of the law of the state of the child's habitual residence.

In this case, the district court received such a report from the Chilean Central Authority—and completely ignored it when interpreting Chilean law. The Second Circuit affirmed, creating a circuit split that leaves other Hague Convention signatories in a state of confusion as to how the United States complies with its treaty obligations.

The success of any international legal regime depends on reciprocity. If this situation is unresolved, an American parent of an abducted child may soon find him/herself before a foreign tribunal that feels free to ignore the United States government's view of American law.

The Supreme Court should grant review.

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[15] *See* Hague Conference, "Status Table, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction," available at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant review of this matter.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: March 4, 2008 Decided: July 18, 2008)

Docket No. 06-5614-cv

HUGO ALEJANDRO VILLEGAS DURAN,

Petitioner-Appellant,

—v.—

JOHANA IVETTE ARRIBADA BEAUMONT,

Respondent-Appellee.

Before:

WINTER and WESLEY, *Circuit Judges*,
and COGAN, *District Judge*.*

Appeal from a final judgment of the United States District Court for the Southern District of New York (Robinson, J.) dismissing for lack of jurisdiction petitioner's motion for return of his daughter to Chile. We affirm and hold that petitioner did not

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* The Honorable Brian M. Cogan, United States District Court for the Eastern District of New York, sitting by designation.

actually possess custody rights at the time of his daughter's removal to the United States, such as to allow him to seek return of her, under the Hague Convention, implemented by the International Child Abduction Remedies Act.

Judge Wesley dissents in a separate opinion.

JOSHUA A. BROOK (Roderick L. Arz, *on the brief*), Arnold & Porter, LLP, New York, N.Y., *for Appellant.*

ROBERT D. ARENSTEIN, New York, N.Y., *for Appellee.*

COGAN, *District Judge*:

Appellant, Hugo Alejandro Villegas Duran, seeks an order compelling Appellee, Johana Ivette Arribada Beaumont, to return their daughter, Valentina Almendra Villegas Arribada, to Chile under the Hague Convention on the Civil Aspects of International Child Abduction, done at the Hague on Oct. 25, 1980, T.I.A.S. No. 22,670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (1986) (the "Hague Convention"), implemented by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 *et seq.* (2000). The United States District Court for the Southern District of New York (Robinson, J.) denied Appellant's petition for an order of return, finding that Appellant does not have rights of custody under the Hague Convention.

We hold that Appellant's rights do not constitute rights of custody within the meaning of the Hague

Convention. Because a district court has jurisdiction to order the return of a child under the Hague Convention only if the child has been removed in breach of a petitioning parent's custodial rights, the district court lacked jurisdiction to order the return of the child and properly dismissed the petition.

BACKGROUND

Appellant and Appellee, both Chilean citizens, were involved romantically but never married. Their daughter was born on April 22, 2001, in Chile and lived with both parents until they separated in 2004. While the separated couple lived in Chile, the child lived with Appellee, and Appellant had visitation rights.

Under Chilean law,[1] Appellee could not remove the child from Chile without Appellant's permission, and Appellant refused to consent. Therefore, Appellee petitioned the Eighth Minors' Court of Santiago, and the court issued an order authorizing her to travel to the United States with the child for three months. Appellee and the child departed Chile on August 3, 2005. The travel period expired on November 3, 2005, but Appellee remained with the child in the United States, in violation of the Chilean court's

[1] Law N° 16,618—MINORS LAW, TITLE III, JUVENILE COURT SYSTEM—ORGANIZATION AND POWERS, Art. 49, provides: Should the custody of a child have not been granted by the judge to either parent or to a third party, the minor may not exit the country without the authorization of both parents, or from the one who had recognized him . . . . If such authorization cannot be granted or if, without reasonable grounds, is refused by the person from whom it is required, it may be granted by the juvenile judge having jurisdiction over the place of residence of the minor.

order. According to a certification issued by the Eighth Minors' Court of Santiago on August 28, 2006, a final determination of sole custody for the child has not yet been determined.

On July 25, 2006, Appellant filed a Petition for the Return of Child and an Order to Show Cause in the Southern District of New York. The district court held evidentiary hearings on the Petition and found that it lacked jurisdiction to order the return of the child because Appellant did not have rights of custody under Chilean law. The court then denied Appellant's motion for reconsideration. This appeal followed.

DISCUSSION

The issue before this Court is whether under the Hague Convention Appellant has custody rights as opposed to rights of access. If Appellant has custody rights, United States courts would have jurisdiction to order the return of the child. However, if Appellant merely has access rights, as the district court found that he did, then United States courts are without jurisdiction to order this remedy.

In a case brought under the Hague Convention, we review the district court's conclusions of law de novo. *Croll v. Croll*, 229 F.3d 133, 136 (2d Cir. 2000). "In cases arising under the Convention, a district court's factual determinations are reviewed for clear error." *Blondin v. Dubois*, 238 F.3d 153, 158 (2d Cir. 2001). In addition, "[t]he [d]istrict [c]ourt's application of the Convention to the facts it has found, like the interpretation of the Convention, is subject to de novo review." *Id.*

"In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning." *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992). Although we begin with the text, we may also "look beyond the written words" to other factors, such as the "history of the treaty, the negotiations, and the practical construction adopted by the parties," for guidance. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-35 (1991) (internal quotations omitted).

The Hague Convention was entered into force for the United States on July 1, 1988, for the purpose of "protect[ing] children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, Preamble, 51 Fed. Reg. at 10,498. The Hague Convention is specifically designed to prevent the removal or retention of children by close family members. "To deter family members from removing children to jurisdictions more favorable to their custody claims in order to obtain a right of custody from the authorities of the country to which the child has been taken, the Hague Convention attempts to deprive [their] actions of any practical or juridical consequences." *Gitter v. Gitter*, 396 F.3d 124, 129-30 (2d Cir. 2005) (internal quotations omitted). The Hague Convention adopts the principle that the child's country of "habitual residence" is "best placed to decide upon questions of custody and access." *Croll*, 229 F.3d at 137 (quoting Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law*, in 3 Acts and Documents of the Fourteenth Session (Child Abduc-

tion) 426, 434-35, ¶ 34 (1980)).[2] Both the United States and Chile are signatories to the Hague Convention.

"A petitioner cannot invoke the protection of the Hague Convention unless the child to whom the petition relates is 'habitually resident' in a State signatory to the Convention and has been removed to or retained in a different State." *Gitter*, 396 F.3d at 130. Since the Hague Convention distinguishes between two types of parental rights—rights of custody and rights of access, granting different protections to parents with regard to each type of rights—a removal or retention is considered "wrongful" for the purpose of return of the child under the Hague Convention where: (a) it is in breach of rights of custody attributed to a person under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Hague Convention, art. 3, 51 Fed. Reg. at 10,498.

This Court has recognized that rights of custody may arise "by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." *Gitter*, 396 F.3d at 130. Thus, in order to

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[2] Elisa Pérez-Vera was "the official Hague Conference reporter for the Convention." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,503. "Her explanatory report is recognized by the Conference as the official history and commentary on the Convention," *id.*, and we have previously said that "it is an authoritative source for interpreting the Convention's provisions," *Croll*, 229 F.3d at 137 n.3.

prevail on a claim under the Hague Convention, a petitioner must establish by a preponderance of the evidence that (1) the child was habitually resident in one State and then removed to or retained in a different State; (2) the removal or retention was in breach of the petitioner's custody rights under the law of the place of habitual residence; and (3) the petitioner was exercising custody rights at the time of the removal or retention. *See* 42 U.S.C. § 11603(e)(1)(A); *Gitter*, 396 F.3d at 130-31.

The Hague Convention distinguishes between rights of custody and rights of access. It defines the latter as "the right to take a child for a limited period of time to a place other than the child's habitual residence." Hague Convention, art. 5, 51 Fed. Reg. at 10,498. Although remedies exist in the event that a child is removed in breach of access rights, recourse for such removal does not include an order of return to the child's place of habitual residence. *See id.* art. 21, 51 Fed. Reg. at 10,500. In such situations, district courts may fashion a remedy ordering the custodial parent who has removed the child to allow and financially provide for periodic visits by the non-custodial parent.

Neither the Hague Convention nor its implementing legislation defines "habitual residence." However, we have previously articulated the standard used to determine a child's habitual residence.

> First, the court should inquire into the shared intent of those entitled to fix the child's residence (usually the parents) at the latest time that their intent was shared. In making this determination the court should look, as always in determining intent, at actions as well as declarations.

> Normally the shared intent of the parents should control the habitual residence of the child. Second, the court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to [a] new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent.

Gitter, 396 F.3d at 134.

Applying these principles to the facts of this case, we hold that the district court properly found Chile to be the child's place of habitual residence. As both parents are Chilean citizens, their child was born in Chile and lived in Chile until August 2005 when Appellee took her to the United States, a settled mutual intent to make Chile the child's permanent home can be easily concluded. There is no evidence to the contrary and certainly no joint settled intention to abandon Chile as the habitual residence. Furthermore, Appellee represented to the Chilean court that the child's removal was only temporary and that she intended to return the child to Chile after a period of three months. Therefore, Chile, and not the United States, is the habitual place of the child's residence.

We now turn to the primary issue of this case, that is, whether Appellant has rights of custody. Under Chilean law, when parents live separately, the responsibility for the personal care of their child rests with the mother. *See* CODE CIVIL Section 225 (Chile). However, the other parent still has a *ne exeat* right: the right to determine whether the child will leave the country. *See* MINORS LAW 16,618 art. 49. Although Appellee was granted permission by

order of the Chilean court to leave the country with the child for three months, violation of the conditions of that order can be a violation of Appellant's *ne exeat* right.

In interpreting the Hague Convention, this Court has held that violating a *ne exeat* right is insufficient to qualify as a violation of custodial rights. *See Croll*, 229 F.3d at 138-140. In *Croll*, we found that a *ne exeat* clause does not create rights of custody within the meaning of the Hague Convention. 229 F.3d at 135. We explained that "custody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things." *Id.* at 138. We have reasoned that custody under the Hague Convention "references a bundle of rights . . . and is in some tension with the idea . . . that one can have custody by holding a *single* power such as the veto conferred by a *ne exeat* clause." *Id.* at 139. Furthermore, we have said that although a *ne exeat* right limits a custodial parent's power to expatriate a child, it does not amount to a power to determine where the child will live. *Id.* at 139. To hold otherwise would be "unworkable" because the Hague Convention assumes that "the remedy of return will deliver the child to a custodial parent who (by definition) will receive *and care for* the child. It does not contemplate return of a child to a parent whose sole right—to visit or veto—imposes no duty to give care." *Id.* at 140.

We agree with the district court that Appellant did not establish the custody requirement by a preponderance of the evidence. Appellant primarily relies

on an affidavit from the Chilean Corporation of Judicial Assistance of the Region Metropolitana (the "Central Authority") as support for his argument that he has custodial rights under Chilean law. Appellant maintains that the district court failed to afford the Chilean Authority's interpretation of Chilean law appropriate weight. The issue of whether the Central Authority's affidavit constitutes an authoritative interpretation for the purposes of the Hague Convention is inconclusive for a number of reasons, including the fact that the Chilean Authority may not have had all information on this case available to it at the time that it made its assessment. However, it is readily apparent that even if it is authoritative, the district court was not bound to follow it. As this Court has previously stated, "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002). Reasons existed for the district court to refrain from giving the affidavit absolute deference. Most importantly, the Central Authority's conclusion that joint custody exists under Chilean law as a default rests almost exclusively on the *ne exeat* right. We have already stated that as we interpret the Hague Convention, this veto power does not confer rights of custody.

Appellant misinterprets the weight the district court gave to the opinion of Appellee's witness. The district court explicitly found that this individual was *not* an expert, and there is no reason to conclude that it afforded his testimony substantial weight. Instead, the district court looked to the

rights Appellant claimed to possess in order to determine whether he, in fact, had custody rights.

Appellant also relies on the fact that he had visitation rights and that he paid for certain medical expenses. He points to Article 229 of the Chilean Civil Code which provides that a parent "who is not personally responsible for the care of a child will not be deprived of the right . . . to maintain a direct and regular relationship with the child." However, this article addresses visitation rights only and not rights to care for the child under a custodial relationship.

At oral argument, the district court attempted on a number of occasions to elicit what rights Appellant has that he claims would amount to custody. However, Appellant was unable to offer anything more than the language of Article 229, visitation rights, payment of some expenses and possibly registering the child for school.[3] As the district court stated:

> I don't see where he had rights. The one document that you showed me gave him a very specific right . . . . It said one very specific thing. On Sundays, from 10 to 8 or 10 to 10, depending on season, he got to see

[3] Compare these rights with the rights detailed in *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634 (E.D.N.Y. 2000), where the district court found rights of custody. In that case, one petitioner presented a consent approved by an Australian court affording him joint guardianship. He also testified as to how he participated in educational decisions, studied with his children and aided in filling out forms for course selection, discussed dental care arrangements with respondent, "recommended and offered to facilitate designating a general practitioner for medical needs", taught his children how to surf and maintained regular communication. *Id.* at 639.

> the child. It didn't say, and by the way, these are a list of the other things you get to decide in the child's life. You get to decide, as I said, what school the child goes to. You get to bring the child to school every day or pick the child up from school every day or make determinations about what classes the child will take or what extracurricular activities the child will be in. Those are the kinds of things that would lead me to say he was given custodial rights versus he was given access. I don't see any of that.

On the other hand, Appellee has the authority to make all these crucial decisions for the child. The only restrictions on Appellee's decision-making power under Chilean law are that she has to allow Appellant his scheduled visitations and she cannot take the child out of the country without either Appellee's permission or a court order.

The bundle of rights Appellant lays claim to does not create rights of custody under the Hague Convention and ICARA; they cumulatively amount merely to a right of access. We find, as the district court concluded, that Appellant has no right to make determinations about the wellbeing and conduct of the child. These rights belong to Appellee.

CONCLUSION

For the foregoing reasons, we hold that, under the Hague Convention, the rights conferred on Appellant do not amount to rights of custody. The removal of the child from Chile, although in violation of a lawful order from a Chilean court, did not breach rights of custody and was therefore not "wrongful"

under the Hague Convention. The district court's order dismissing the petition for lack of jurisdiction and ordering periodic visitation of the child for Appellant is AFFIRMED.

WESLEY, *Circuit Judge*, dissenting:

The majority has correctly identified the central question in this case: Whether Appellant has the "rights of custody" over his daughter necessary to invoke the Hague Convention's remedy of return of the child? *See* Hague Convention on the Civil Aspects of International Child Abduction art. 3, Oct. 25, 1980, T.I.A.S. No. 22,670, 1343 U.N.T.S. 89. Under the facts of this case, where there has been no judicial determination of custody, the answer to that question depends on whether, under Chilean law, the default rule when the unmarried parents of a minor separate is that they share joint custody or that the mother has sole custody. The majority determined that, notwithstanding the affidavit from the Chilean Central Authority asserting that separated unmarried parents share joint custody by operation of Chilean law, this Circuit's decision in *Croll* requires the conclusion that Appellant had only rights of access. I disagree and would vacate the decision below and remand this case for proceedings consistent with this Circuit's practice of giving some deference to a foreign sovereign's view of its own law.

DISCUSSION

In *Croll*, we held that a custody decree that granted a father access rights and contained a *ne exeat* clause, while explicitly granting sole custody of the minor to her mother, did not bestow the sort of custodial rights on the father necessary for him to invoke the right of return under the Hague Convention. *Croll v. Croll*, 229 F.3d 133, 134-35 (2d Cir. 2000). The majority finds that this forecloses Appellant's argument that Article 49 of the Minor Law's *ne exeat* clause[1] and Section 229[2] of the Civil Code's mandate that the parent without "personal care" of the child has the "right" and "duty" to maintain a "direct permanent relationship" with the child are indicative of the fact that, under Chilean law, parents share custody of a minor in the absence of any judicial decree to the contrary.[3]

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[1] This provision is reprinted in footnote 1 of the majority's opinion.

[2] Book I of the Civil Code of the Republic of Chile, Title IX: Rights and duties between parents and children, Section 229, provides in relevant part (in translation):

> The father or mother who does not have the personal care of a child shall not be exempted from the duty to sep [sic] a direct, permanent relationship with he/she, and to contact it as frequently and freely as agreed with its guardian or, otherwise, as determined by the judge as being in the best interest of the child.

[3] Appellant does not contest that Appellee, the minor's mother, also has rights of custody pursuant to Section 225 of the Chilean Civil Code, which assigns "personal care" of a minor to her mother "if the parents live separately" in the absence of any mutual agreement or judicial decision to the contrary.

I believe that the majority over-reads *Croll*. *Croll* undoubtedly holds that a *ne exeat* clause cannot *convert* rights of access into rights of custody in the context of an explicit judicial determination of the respective rights of the parents. However, in my mind, this does not foreclose Appellant's argument that a statutorily enshrined *ne exeat* clause may be *evidence* of a legal regime's recognition of shared "rights of custody" in the absence of any judicial determination. This is particularly true in light of the fact that the Appellant does not solely rely on Article 49's *ne exeat* clause, but also points to Section 229's specific delegation of rights and duties to the parent without "personal care" of the minor. The majority dismisses Section 229 as "address[ing] visitation rights only," but cites no authority for that proposition.[4] Thus, while this Court's case law clearly does not compel Appellant's preferred inter-

[4] It is similarly unclear on what grounds the district court rejected Appellant's interpretation of Section 229. Carlos Bianchi testified in the district court *as a lay witness* on behalf of Appellee regarding the proper interpretation of the relevant provisions of Chilean law: Article 49 of the Minor Law, and Sections 225 and 229 of the Civil Code. He asserted, in relevant part, that Section 229 grants only rights of access under Chilean law, not rights of custody. The majority writes that: "The district court explicitly found that [Bianchi] was *not* an expert, and there is no reason to conclude that it afforded his testimony substantial weight. Instead, the district court looked to the rights Appellant claimed to possess in order to determine whether he, in fact, had custody rights." Despite the majority's assertion, however, it is hard to tell on what grounds the district court might have rejected Section 229 as a potential source of custodial rights other than Bianchi's testimony to that effect. Of course, this Court has held that lay testimony on a question requiring expertise is of no probative value. *See Pfeiffer v. Silver*, 712 F.2d 799, 804 (2d Cir. 1983).

pretation of Chilean law, I also do not believe that it requires us to reject it.

The primary evidence that Appellant offers in support of his preferred interpretation of Chilean law is an affidavit from the Chilean Corporation of Judicial Assistance of the Region Metropolitana (the "Central Authority").[5] The Chilean Authority writes that:

> The "right of custody" alluded [to] by the [Hague] Convention, in [Chilean] legislation . . . is linked [to] and includes the following rights: the "custody," the "personal care of the minor," the "guard[,]" the "patria potestas," and the "right to authorize the minor['s] exit of the country," which are regulated in different articles contained in different Laws.

Emphasizing the *ne exeat* clause contained in Article 49 as "relevant, especially" in the instant case, the Chilean Authority concludes that "the 'right of custody,' to which the [Hague] Convention . . . refer[s] . . . is shared by [Appellant] Villegas and [Appellee] Arribada." The Chilean Authority also notes that "both parents have the guard and custody of their daughter" and that "'the decisions of major importance' must be adopted by both parents" under Chilean law.

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[5] The Appellant also provided an unpublished article by Chilean Professor Bernardita Briones Maira that supports his interpretation of Chilean law, as well as a copy of Professor Maira's impressive resume. Judge Robinson did not mention the article during his oral decision and denied Appellant's motion for reconsideration based on an offer of Professor Maira's testimony on his behalf.

The majority concludes that even if the Central Authority's affidavit is "authoritative" with respect to Chilean law, "the district court was not bound to follow it." They explain that even though "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference," "[r]easons existed for the district court to refrain from giving the affidavit absolute deference." The only such reason cited by the majority is that "the Chilean Authority's conclusion that joint custody exists under Chilean law as a default rests almost exclusively on the *ne exeat* right"—reasoning which they contend conflicts with *Croll*.

I respectfully disagree with the majority for two reasons. First, it is not clear from the district court's decision whether it gave *any* deference at all to the Central Authority's interpretation of Chilean law.[6] Indeed, the district court did not even mention the affidavit in justifying his determination that Appellant had no custody rights. This runs counter not

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[6] The Hague Convention specifically designates the Central Authority of a contracting State as that State's authoritative voice regarding its view of its own custody laws as relevant to Article 3 of the Convention:

> The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Hague Convention art. 15.

only to precedent in this circuit holding that a foreign government's interpretation of its own law merits considerable deference *see, e.g., Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002), but also to precedent of sister circuits suggesting that such deference is particularly favored in the context of determining custody rights under the Hague Convention, *see, e.g., Navani v. Shahani*, 496 F.3d 1121, 1128 (10th Cir. 2007).

Second, it is not at all clear from the Chilean Authority's language that its custody determination rests *solely* on Article 49's *ne exeat* clause, which would be necessary for the district court to dismiss the affidavit entirely even under the majority's reading of *Croll*. For instance, the affidavit specifically distinguishes the "guard" element of custody from the "right to authorize the minor['s] exit of the country," and then notes that separated parents share the former as well as the latter. Moreover, there is language in the affidavit—such as, "'the decisions of major importance' must be adopted by both parents"—which would seem to favor a finding of joint custody under this Court's precedent. *See Croll*, 229 F.3d at 138 ("[C]ustody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things.").

CONCLUSION

I see no need to reach a conclusion on the ultimate merits of Appellant's preferred interpretation of Chilean law. I would vacate the district court's decision and remand the case for further proceedings consistent with this Court's practice of giving some deference to a foreign sovereign's view of its own law.[7] The majority notes that "[t]he issue of whether the Central Authority's affidavit constitutes an authoritative interpretation for the purposes of the Hague Convention is inconclusive for a number of reasons, including the fact that the Chilean Authority may not have had all information on this case available to it at the time that it made its assessment." I agree. On remand, the district court could both ensure that the Chilean Authority had access to all of the relevant materials and determine the precise legal basis for the Authority's assertion of joint custody (assuming it stands) by following the procedure specified in Article 15 of the Hague Convention for how a judicial authority may obtain a foreign sovereign's authoritative interpretation of its own custody laws.[8]

The bottom line here is that a child has traveled to the United States with her mother and has not returned to Chile as earlier promised. Thousands of miles and two distant and different legal system separate the child from her father. An international

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[7] It would also have aided this Court's review of the district court's decision if, on remand, the court clarified its treatment of Bianchi's testimony and Professor Maira's article, as well as its grounds for rejecting the Appellant's interpretation of Section 229 of the Chilean Civil code.

[8] *See supra* note 6.

accord provides the substantive and procedural mechanisms to resolve the dispute. Adherence to its provisions and careful attention to rights given a parent under Chilean law are central to a fair and just resolution of the dispute. We would expect the same of a Chilean court if a child from the United States were taken there by her mother and failed to return. I would ask for that same careful attention here and therefore I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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06 Civ. 5608 (SCR)

White Plains, N.Y.
August 31, 2006
10:30 a.m.

HUGO ALEJANDRO VILLEGAS DURAN,

Petitioner,

—v.—

JOHANA IVETTE ARRIBADA BEAUMONT,

Respondent.

Before:

THE HONORABLE STEPHEN C. ROBINSON,

District Judge

APPEARANCES

ARNOLD & PORTER, LLP
Attorneys for Petitioner
JOSHUA ALEXANDER BROOK, ESQ.
Also Present: RODERICK L. ARZ

ROBERT D. ARRENSTEIN, ESQ.
Attorney for Respondent
Also Present: SANDRA NUNEZ

[80] MR. BROOK: The second part of inquiry is does he have default rights of custody under the operation of Chilean statutory law. And we contend that, although the personal—225, the personal care of the child, 229 imposes a duty upon him.

THE COURT: To do what?

MR. BROOK: A responsibility to maintain a direct and permanent relationship with him.

THE COURT: That's right. That isn't custody in any sense of the word. That says you must maintain a relationship with your child. That doesn't give you the right to make any decisions for that child. It just says you must maintain a relationship. You must present yourself as the parent, and you must do things with the child. Talk to it. Read to it. Sing to it. Bring it to the park. Those kinds of things. It says nothing about your ability to control what that child does other than in that eight or ten-hour period the child is with you. There's nothing about that. You haven't showed me anything.

MR. BROOK: Your Honor, the cases—

THE COURT: All right, let me tell you, because I know where this is going. In my view, an order for the return of the child is a remedy that is only available when there has been a wrongful act of removal or retention and that that wrongful act was done in breach of a custody right as defined **[81]** by the Convention.

The Convention defines rights of custody as rights relating to the care of the person and child. It generally does that talking about the ability of the parent asserted custody to make determinations, most particularly with respect to where the child lives.

We don't have that here. We could make a case for custody if there were other rights vested in the father in this case. I've stated some of them before. If we had any evidence that the father had the right to make determinations about the wellbeing and conduct of the child. We don't have any indication that there was any of that present here.

The best the Petitioner says is there is this order, which was Exhibit K, which gave access rights on Sundays from either 10:00 in the morning to 8 at night or from 10:00 in the morning to 10 at night during certain seasons and Article 229, which mandates that the father maintain a relationship with the child. That mandate that he maintain a relationship with the child, in this Court's opinion, does not give him custody rights. It doesn't give him the right to decide the residence of the child. It doesn't give him a right to decide what school the child will go to. It doesn't give him the right to decide the particulars of how the child is raised; that is, what religion the child will be and how they will practice religion, if at all. It doesn't give him the right to make a **[82]** determination as to what activities outside of school the child will participate in, if any at all. All 229 says is you need to be a presence in your child's life. It doesn't give him the right to make those decisions.

I have seen no order, no statement in statute or law from Chilean law, that this Petitioner is clearly in breach of other than access rights, which I clearly think her removal of the child from Chile breached.

But the Convention provides a recourse in the event that the child is moved from its place of habitual residence in breach of access rights versus in breach of custody rights, and they do not include an order to return the child to their former place of habitual residence. That might happen in this case when the custody proceedings in Chile wind to their conclusion. There may be an order in the court there granting him custody rights, which would then mean she has an obligation to bring the child back in order to allow him to exercise. But to vindicate a breach of the rights of access, the Convention only authorizes us to use remedies to promote the peaceful enjoyment of access.

What courts have done in the past with respect to that, and which I think is a reasonable measure here, is to issue a writ ordering that the custodial parent who has removed the child from their place of habitual residence permit and pay for periodic visitation by the noncustodial parent so that he can effectuate his obligation under Article 229 to maintain his [83] relationship with the child and he can effectuate the judgment of this Court that, at least one day a week, he has access.

So I am not ordering—I am denying the Petitioner's petition. I am not ordering that the child be brought back.

I do want the parties to discuss and get back to me hopefully a joint order where they agree upon the steps to be taken to remove the obstacles to the Petitioner's exercise of his right of access; that is, how often he will get to visit the child and when they're going to pay for it.

If you folks can't decide on what's reasonable, you will both write me and tell me what your positions

are, and I'll issue an order. I clearly am not going to order that she bring him every week—fly him every week from Chile to the United States. So let me give you an idea of what might sound reasonable to this Court.

Instead of it being one day a week, we figure out certain weeks during the year where he has greater access; during vacations, during holidays, during off days from school. So instead of it being one day for eight hours, we might pose that, in month number—in month A, he has access for this string—this number of days, and we will fly him up in order to effectuate that. And then in month number B, he has access for this number of days. And there are X number of times a year that we are willing to fly him up. The number, in my view, is not, obviously, going to be every week or 50 trips [84] up, but it's also not going to be one. So the parties need to try to be reasonable about what that means. And if you can't, as I say, come to an agreement, I will order something, and then the parties will either do what I order or there will be a breach of this Court's order, in which case I will have full control over the matter.

So today is Thursday. Can the parties get back to this Court in written form by Tuesday of next—yes, sir.

MR. ARENSTEIN: If the Court please, I an leaving on Friday night for Shanghai, and I'm not going to be back until the 14th of September.

THE COURT: Okay. Well, by tomorrow night, you folks need to have discussions.

MR. ARENSTEIN: I'm not—I'm sorry. I'm leaving tonight to go up to Vermont. I'm not even going to be here. But could I be heard on that issue?

THE COURT: Yes.

MR. ARENSTEIN: There was an order of the Court providing for a $2,500 bond which was there for the father to use to be able to see the child. And he took that bond. So he has that money right now to use.

THE COURT: All right.

MR. ARENSTEIN: That was part of the order that allowed her to leave Chile.

THE COURT: Well, there are two things to talk about.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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06 Civ. 5608 (SCR)

White Plains, N.Y.
October 26, 2006
12:00 p.m.

HUGO ALEJANDRO VILLEGAS DURAN,

Petitioner,

—v.—

JOHANA IVETTE ARRIBADA BEAUMONT,

Respondent.

Before:

THE HONORABLE STEPHEN C. ROBINSON,

District Judge

APPEARANCES

ARNOLD & PORTER, LLP
Attorneys for Petitioner
JOSHUA ALEXANDER BROOK, ESQ.
Also Present: RODERICK L. ARZ

ROBERT D. ARENSTEIN, ESQ.
Attorney for Respondent

[2] THE DEPUTY CLERK: Your Honor, this is in the matter of Hugo Alejandro Villegas Duran against Johana Ivette Arribada Beaumont.

Starting with the plaintiff, can I have counsel state their appearance for the record, please.

MR. BROOK: Joshua Brook, Arnold & Porter, for the Petitioner.

THE COURT: Good afternoon, Mr. Brook.

MR. BROOK: Good afternoon, your Honor.

MR. ARZ: Roderick Arz, Arnold & Porter, for the Petitioner.

THE COURT: Good morning, Mr. Arz.

MR. ARZ: Good morning.

MR. ARENSTEIN: Robert D. Arenstein for the Respondent. And I have the Respondent here with me.

THE COURT: Good afternoon, Mr. Arenstein.

Good afternoon, Ms. Beaumont.

As I understand it, there are two purposes for this conference, one being that the plaintiffs wanted to file a motion for reconsideration, and, secondly, to talk about the situation with regard to setting up appropriate visitation understandings in this matter.

So first let me turn to the plaintiffs.

Talk to me about your motion for reconsideration. Why is it that you want to file one? Has there been some new [3] information or evidence that this Court must consider?

MR. BROOK: Thank you, your Honor.

Yes, there is, your Honor. We would like to bring to the Court's attention the article that was attached

as Exhibit W to the papers we submitted earlier, which is an article by a professor of civil law at Diego Portales University, Professor Bernardita Briones Maira, in which she argues that, under the relevant Chilean statutes, where the parents have separated, both parents retain custody rights, as that term is understood in the Hague Convention. We think your Honor would be interested in hearing her views. It might lead him to a different conclusion in this case.

THE COURT: That's the basis of it, that article that was submitted with the papers in this case?

MR. BROOK: Yes, your Honor.

THE COURT: Okay. Well, there has been no new information submitted to this Court that makes me think that the previous ruling from this Court should be reconsidered, and so I'm going to deny the motion.

All right, let's talk about what is an appropriate visitation situation to set up here. What's the dispute? What's the problem between the parties? I would have hoped this is something you folks could work out. Why can't you?

MR. BROOK: May I, your Honor?

THE COURT: Yes.

APPENDIX D

[LETTERHEAD OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 15th day of September two thousand and eight,

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Docket No. 06-5614-cv
Filed September 15, 2008

HUGO ALEJANDRO VILLEGAS DURAN,

Petitioner-Appellant,

—v.—

JOHANA IVETTE ARRIBADA BEAUMONT,

Respondent-Appellee.

ORDER

Appellant, Hugo Alejandro Villegas Duran having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that

determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ FRANK PEREZ
Frank Perez, Deputy Clerk

APPENDIX E

OFFICE N° 0038-2006

REF.: Minor Valentina Almendra Villegas Arribada Restitution to Chile, requested under the Convention of The Hague, of 25.10.1980.

SUBJECT MATTER.: There are sent documents with request that indicates.

Santiago, On January 17, 2006.

TO: NATIONAL CENTER FOR MISSING and EXPLOITED CHILDREN CHARLES B. WANG INTERNATIONAL CHILDREN'S BUILDING 699 PRINCE STREET ALEXANDRIA, VA 22314-3175 UNITED STATES.

FROM: PAULA STRAP CAMUS, DIRECTOR GENERAL, CORPORATION OF JUDICIAL ASSISTANCE OF THE REGION METROPOLITANA.

Of my consideration:

I have the pleasure to address me to you, with relation to a new case of restitution to Chile requested in agreement with the Convention of The Hague on the Civil Aspects of the Minors' International Abduction, in force between The United States and Chile, from July 1st, 1994, this Central Authority sends, annex to the present Office, the request and documents accompanied by Mr. **HUGO ALEJANDRO VILLEGAS DURÁN,** to be able to bring on returning to the Republic of Chile, to his minor of age daughter, **VALENTINA ALMENDRA VILLEGAS ARRIBADA,** born on April 22nd, 2001, who is illicitly being retained in The United States by her mother **JOHANA IVETTE ARRIBADA BEAUMONT.**

Mr. Hugo Alejandro Villegas Durán never authorized that his daughter was traveling in company of her mother, to New York, USA on August 3rd, 2005, for what Mrs. Johana Arribada should have requested a judicial permission to go out with her daughter of the country. The above mentioned permission was granted by the Judge of Eighth Minors' Court of Santiago, by means of judgment of date July 19th, 2005, which is accompanied in this presentation, which authorized the girl Valentina Almendra Villegas Arribada to travel to Rye Brook's City, New York State, USA for a term of 3 months, which began with date August 3rd, 2005.

The girl Valentina had to return to Chile on November 3rd, 2005, it being produced from that day the illicit retention of the girl in The United States for the part of her mother.

It is necessary to do present, that Mrs. Arribada requested, at the end of December, 2005, that is to say one month and half after having conquered the term, before Eighth judged of the Minors of Santiago an extension of the term to remain in The United States with her daughter, nevertheless the above mentioned request was refused by the Court with date January 9th, 2006. The previous thing demonstrates that the only intention of Mrs. Arribada is to remain with the girl in The United States, cutting any bond of the girl with her father and family in Chile.

Up to date, the girl has not returned to her country of habitual residence, this is, Chile; therefore, Valentina is being retained illicitly in The United States by her mother, without the assent or will of her father, Mr. Hugo Alejandro Villegas Durán; what

constitutes an infraction to the national laws about minor of age's exit in our country, all time that the retention abroad of the girl on the part of her mother, Mrs. Johana Ivette Arribada Beaumont, constitutes an infraction to the article 49 of the Law N°16.618, which establishes the norms to which the minors of age's abroad exits must be subjected, inasmuch as Valentina's permanency out of the country has not neither the will of the father, nor the authorization of the competent Court (whose authorization expired on November 3rd, 2005), and, besides, it constitutes an infraction to the right of custody dedicated in the law and that Mr. Villegas Durán was actually exercising.

The girl and her mother would be in the following domicile: 1 Park Ridge Court, Rye Brook N.Y. 10573, 1st floor, New York's State, Telephones (914) 3911654 and (914) 9396689.

The retention of the girl of family names Villegas Arribada in The United States must be considered to be illegal in the terms of the article 3 of the Convention of The Hague, and of the Chilean legislation.

In agreement to the article 3 of the mentioned Convention, the retention is considered to be illicit, when it has been produced with infraction to a right of custody attributed to a person with arrangement to the in force right in the state in which the child had his/her habitual residence immediately before the retention.

The "right of custody" alluded by the Convention, in our legislation it is linked and includes the following rights: the "custody", the "personal care of the minor", the "guards" the "patria potestas", and the

"right to authorize the minors' exit of the country", which are regulated in different articles contained in different Laws.

Therefore, all of them in their set, they include what understands the Convention of The Hague for "right of custody".

In the particular case of the girl Valentina Almendra Villegas Arribada, in relation with the rights that includes "the right of custody" of the Convention of The Hague, it is relevant, especially, "the right to authorize the minors' exit of the country", since, in agreement with the Chilean legislation, this is what establishes the right to determine the place of residence of a girl, in this case.

The article 49 of the Minors' Law of Chile (Law N° 16.618), is the precept that contains the "right to authorize the minors' exit of the country".

Regulating the minors of age's exit from Chile, the above mentioned precept indicates the following thing: "If the custody of the child has not been entrusted by the judge neither to anyone of her parents nor to a third one, that one will not be able to go out of the country without the authorization of both parents". The same article indicates also that "In case it will not be able to be granted or without plausible motive it will be denied the authorization for one of those that by virtue of this article it must give it, it will be able to be granted by the letters' judge of minors of the place in which the minor has the residence. The judge, to authorize the exit of the minor in these cases, will take in consideration the benefit that it will be able to report and will indicate the time for what grants the authorization". In the

particular case. the Judge of Eighth Minors' Court of Santiago granted an authorization in order that the girl was traveling only for three months to The United States, without authorizing an extension of the term.

Everything previous means that, of does not exist a Judicial Firm Judgment that grants the custody of the child to a certain person, regarding the "right to authorize the minors' exit of the country". in Chile the "right of custody" is shared by both parents.

Up to date, no Judge of the Republic of Chile has granted the custody of the child to her mother, and it is for this motive.that Mrs. Arribada needed the authorization of a Chilean Court, not having the authorization of the girl's father, Mr. Hugo Alejandro Villegas Durán, in order that his daughter should go out of Chile.

That is to say, the previous thing confirms that Mrs. Arribada was not exercising the "right of custody" of the girl independently and separately from Mr. Villegas, but this right both parents continue deforcing it as a whole.

In consequence, taking in consideration indicated with regard to the 'right to authorize the minor's exit of the country', the 'right of custody', to which the Convention of The Hague is referred, it is shared by Mr. Villegas and Mrs. Arribada, which must exercise it as a whole in accordance with our juridical classification.

Therefore, Mrs. Arribada does not executing and to violate the authorization granted by the judge of Eighth Minors' Court of Santiago, which authorized in order that the girl was going out of the country

only for the period of 3 months, has transgressed the article 3rd of the Convention of The Hague, retaining illicitly the girl in The United States; since it does not correspond to Mrs. Arribada, to determine arbitrarily the place of Valentina's residence, since this right corresponds to be exercised as a whole with Mr. Hugo Alejandro Villegas Durán, and when the father is in agreement with the movement and illicit retention of his daughter in The United State, corresponds that she is returned to Chile, which is the place of habitual residence of the girl, and holds to the dispositions relative to custody and rights of searches that the Chilean legislation or the competent authorities of Chile could stipulate.

Finally, and in attention that the place of habitual residence of the girl is Chile, since here she had her center of life before being retained illicitly by her mother in The United States and the fact that both parents have the guard and custody of their daughter, the mother, does not have any right to decide to change the place of residence of the girl (what has enormous effect in the life of a child) since 'the decisions of major importance' must be adopted by both parents, since to both parents compete the well-being of their daughter. Therefore, none of them can unilaterally take decisions respect of their daughter and specially, establish the place of residence of the girl, as the mother would be doing it on having illicitly retained her daughter in The United States, without authorization of the father.

In consequence, I request you to have to good, to confirm the exact location of Mrs. Arribada and the girl in The United States, and to arrange that there are taken all the measurements that could guarantee

the immediate restitution of the girl, in conformity with arranged in the Article 12 of the Convention. We request, also, there is suspended any processing of request of definitive residence in that country for the minor of age girl, while her mother Mrs. Johana Ivette Arribada Beaumont.

Besides, we will be grateful of the Central Authority of the United States to realize all the necessary efforts in order that there is granted Judicial Free Assistance and Exemption of Judicial Coasts to Mr. Hugo Alejandro Villegas Durán, has in Chile of the Benefit of Privilege of Poverty, as it is clear in the respective document that accompanies to the present one in case of incurring judicial expenses.

We are grateful in advance, the whole help that your distribution could offer for the location and immediate return to Chile of the minor of age girl Valentina Almendra Villegas Arribada, you be served to communicate with us if you need another information or documents of the petitioner.

I greet you attentively

PAULA CORREA CAMUS

GENERAL DIRECTOR

CORPORATION OF JUDICIAL ASSISTANCE

[LETTERHEAD OF GOBIERNO DE CHILE
(CORPORACION DE ASISTENCIA JUDICIAL,
REGION METROPOLITANA)]

OFICIO N° 0038-2006

REF.: Menor Valentina Almendra Villegas Arribada. Restitución a Chile, solicitada bajo la Convención de La Haya, de 25.10.1980.

MAT.: Remite documentos con solicitud que indica.

Santiago, 17 de Enero de 2006.

A: NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN CHARLES B. WANG INTERNATIONAL CHILDREN'S BUILDING 699 PRINCE STREET ALEXANDRIA, VA 22314-3175
ESTADOS UNIDOS

DE: PAULA CORREA CAMUS, DIRECTORA GENERAL, CORPORACIÓN DE ASISTENCIA JUDICIAL DE LA REGIÓN METROPOLITANA.

De mi consideración:

Tengo el agrado de dirigirme a usted, con relación a un nuevo caso de restitución a Chile solicitado de acuerdo a la Convención de La Haya sobre los Aspectos Civiles de la Sustracción Internaciónal de Menores, vigente entre Estados Unidos y Chile, desde el 1 de Julio de 1994, esta Autoridad Central remite, anexo al presente Oficio, la solicitud y documentos acompañados por el señor **HUGO**

ALEXANDRO VILLEGAS DURÁN, para poder traer de regreso a la República de Chile, a su hija menor de edad, **VALENTINA ALMENDRA VILLEGAS ARRIBADA,** nacida el 22 de Abril de 2001, quien está siendo retenida ilícitamente en Estados Unidos por su madre **JOHANA IVETTE ARRIBADA BEAUMONT.**

El señor Hugo Alejandro Villegas Durán nunca autorizó a que su hija viajara en compañía de su madre, a Nueva York, EE.UU. el 3 de Agosto de 2005, por lo que la Sra. Johana Arribada debió solidtar un permiso judicial para salir con su hija del país. Dicho permiso fue concedido por la Juez del 8° Juzgado de Menores de Santiago, mediante sentencia de fecha 19 de Julio de 2005, que se acompaña en esta presentación, la que autorizó a la niña Valentina Almendra Villegas Arribada a viajar a la ciudad de Rye Brook, Estado de Nueva York, EE.UU. por un plazo de 3 meses, el que comenzó a correr con fecha 3 de Agosto de 2005.

La niña Valentina debía regresar a Chile el día 3 de Noviembre de 2005, produciéndose desde ese día la retención ilícita de la niña en Estados Unidos por parte de su madre.

Cabe hacer presente, que la Sra. Arribada solicitó, a fines de Diciembre de 2005, es decir un mes y medio después de haber vencido el plazo, ante el 8 Juzgado de Menores de Santiago una ampliación del plazo para permanecer en Estados Unidos con su hija, sin embargo dicha solicitud fue denegada por el Tribunal con fecha 09 de Enero de 2006. Lo anterior demuestra que la unica intención de la Sra. Arribada es permanecer con la niña en los Estados Unidos,

cortando todo lazo de la niña con su padre y familia en Chile.

Hasta la fecha, la niña no ha regresado a su país de residencia habitual, esto es, Chile; por lo tanto, Valentina está siendo retenido ilícitamente en Estados Unidos por su madre, sin el consentimiento ni voluntad de su padre, don Hugo Alejandro Villegas Durán; lo que constituye una infracción a las leyes nacionales sobre salida de menores de edad en nuestro país, toda vez que la retención en el extranjero de la niña por parte de su madre, doña Johana Ivette Arribada Beaumont, -constituye una infracción al artículo 49 de la Ley N°16.618, que establece las normas a que deben sujetarse las salidas de menores de edad al extranjero, dado que la permanencia de Valentina fuera del país no cuenta ni con is voluntad del padre, ni con la autorización del Tribunal competente (cuya autorización caducó el día 3 de Noviembre de 2005), y, además, constituye una infracción al derecho de tuitión consagrado en la ley y que el señor Durán ejercia efectivamente.

La niña y su madre se encontrarían en el siguiente domicilio: 1 Park Ridge Court, Rye Brook N.Y. 10573, 1er piso, Estado de Nueva York. Teléfonos (914) 391 1654 y (914) 939 6689.

La retentión de la niña de apellidos VILLEGAS ARRIBADA en Estados Unidos debe considerarse ilegal en los terminos del artículo 3 de la Convención de La Haya, y de la legislatión chilena.

De acuerdo al artículo 3 de la citada Convención, la retentión se considera ilícita, cuando se ha producido con infractión a un derecho de custodia atribuido a una persona con arreglo al derecho

vigente en el estado en que el niño o niña tenía su residencia habitual inmediatamente antes de la retentión.

El "derecho de custodia" aludido por la Convención, en nuestra legislación está vinculado y comprende los siguientes derechos: la "tuición", el "cuidado personal del menor", las "guardas", la "patria potestad", y el "derecho para autorizar la salida de menores del país" los que se encuentran regulados en diferentes artículos contenidos en Leyes distintas.

Por tanto, todos ellos en su conjunto, comprenden lo que entiende la Convención de La Haya por "derecho de custodia".

En el caso particular de la niña valentina Almendra Villegas Arribada, en relación con los derechos que comprende "el derecho de custodia" de la Convención de La Haya, es relevante, sobre todo, el "derecho para autorizar la salida de menores del país", ya que, de acuerdo a la legislatión chilena, es este el que establece el derecho para determinar el lugar de residencia de una niña, en este caso.

El artículo 49 de la Ley de Menores de Chile (Ley N° 16.618), es el precepto que contiene el "derecho para autorizar la salida de menores del país".

Al regular la salida de menores de edad desde Chile, dicho precepto señala lo siguiente: "Si la tuitión del hijo no ha sido confiada por el juez a alguno de sus padres ni a un tercero, aquél no podrá salir del país sin la autorización de ambos padres". El mismo artículo señala también que "En caso de que no pudiere otorgarse o sin motivo plausible se negare la autorización por uno de aquellos que en

virtud de este artículo debe prestarla, podrá ser otorgada por el juez de letras de menores del lugar en que tenga su residencia el menor. El juez, para autorizar la salida del menor en estos casos, tomará en consideración el beneficio que le pudiere reportar y señalará el tiempo por el que concede la autorización". En el caso particular, la Juez del 8° Juzgado de Menores de Santiago otorgó una autorización para que la niña viajara sólo por tres meses a Estados Unidos, sin autorizar una prórroga del plazo.

Todo to anterior significa que, de no existir una Sentencia Judicial Firme que otorgue la tuición del niño a una persona determinada, en to que respecta al "derecho para autorizar la salida de menores del país", en Chile el "derecho de custodia" es compartida por ambos padres.

Hasta la fecha, ningún Juez de la República de Chile ha otorgado la tuición del niño a su madre, y es por este motivo que la Sra. Arribada necesitó la autorización de un Tribunal Chileno, al no contar con la autorización del padre de la niña, Sr. Hugo Alejandro Villegas Durán, para que su hija saliera de Chile.

Es decir, to anterior confirma que la Sra. Arribada no ejercia el "derecho de custodia" de la niña en forma independiente y separada del Sr. Villegas, sino que este derecho lo siguen detentando ambos padres en conjunto.

Por lo tanto, tomando en cuenta que la Sra. Arribada no tenía el derecho de sacar a la niña del país, carecía, consecuentemente, del derecho para determinar unilateralmente el lugar de residencia de su

hija, ya que este derecho es compartido con el Sr. Villegas.

En consecuencia, tomando en consideración lo señalado con respecto al "derecho para autorizar la salida de menores del país", el "derecho de custodia", al que hacer referencia la Convención de La Haya, es compartido por el Sr. Villegas y la Sra. Arribada, los que deben ejercerlo en forma conjunta de acuerdo a nuestro ordenamiento juridico.

Por lo tanto, la Sra. Arribada al no cumplir y violar la autorización otorgada por la Jueza del 8° Juzgado de Menores de Santiago, que autorizó para que la niña saliera del país únicamente por el período de 3 meses, ha contravenido el artículo 3° de la Convención de La Haya, reteniendo itícitamente a la niña en Estados Unidos; puesto que no le corresponde a la Sra. Arribada, determinar en forma arbitraria el lugar de residencia de Valentina, ya que este derecho corresponde ser ejercido en forma conjunta con el Sr. Hugo Alejandro Villegas Durán, y at no estar el padre de acuerdo con el traslado y retención ilícita de su hija en Estados Unidos, corresponde que sea restituida a Chile, que es el lugar de residencia habitual de la niña, y sujeta a las disposiciónes relativas a custodia y derechos de visitas que la legislación chilena o las autoridades competentes de Chile pudieran estipular.

Finalmente, y atento a que el lugar de residencia habitual de la niña es Chile, pues aquí tenía su centro de vida antes de ser retenida ilícitamente por su madre en Estados Unidos y al hecho que ambos padres tienen la guarda y custodia de su hija, la madre, no tiene ningún derecho a decidir cambiar el lugar de residencia de la niña (que tiene enorme

incidencia en la vida de un niño), toda vez, que "las decisiones de mayor importancia" deben ser adoptadas por ambos padres, pues a ambos padres les compete el bienestar de su hija. Por tanto, ninguno de ellos puede unilateralmente tomar decisiones respecto de su hija y especialmente, establecer el lugar de residencia de la niña, como lo estaría haciendo la madre retener ilícitamente a su hija en Estados Unidos, sin autorización del padre.

En consecuencia, le solicito tener a bien, confirmar la ubicación exacta de la Sra. Arribada y de la niña en Estados Unidos, y disponer que se tomen todas las medidas que puedan garantizar la restitución inmediata de la niña, conforme a to dispuesto en el Articuto 12 de is Convención.

Solicitamos, también, se suspenda toda tramitación de solicitud de residencia definitiva en ese país para la niña menor de edad, mientras no se solucione la situación de encontrarse retenida ilegalmente fuera de Chile, por parte de su madre, doña Johana Ivette Arribada Beaumont.

Además, agradeceremos a la Autoridad Central de Estados Unidos realizar todas las gestiones necesarias para que se conceda Asistencia Judicial Gratuita y Exención de Costas Judiciales al Sr. Hugo Alejandro Villegas Durán, ya que el solicitante no dispose de los ingresos suficientes para financiar un juicio en ese país. Cabe señalar que la atención dispensada por esta Autoridad Central es absolutamente gratuíta y por estas razones el Sr. Hugo Alejandro Villegas Durán, goza en Chile del Beneficio de Privilegio de Pobreza, como consta del respectivo documento que se acompaña a la presente de incurrir en gastos judiciales.

Agradecemos de antemano, toda la ayuda que su repartición pueda brindar para la localización e inmediato regreso de la niña menor de edad Valentina Almendra Villegas Arribada a Chile, sírvase comunicarse con nosotros si necesita otra información o documentos del solicitante.

Saluda atentarnente a usted.

[SEAL]

PAULA CORREA CAMUS

PAULA CORREA CAMUS
DIRECTORA GENERAL
CORPORACIÓN DE ASISTENCIA JUDICAL

APPENDIX F

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I. BACKGROUND.

1. The enactment of the United Nations Convention on the Rights of the Child[1] was the result, at its time, of a change in the mentality and culture of the various States that led to the recognition of children[2] as subjects of rights, in other words, as persons deserving respect and consideration.

Concretely, this change in the way of regarding children materialized in the introduction of a new principle which, as of the time, has been the guiding criterion in the matters that affect them and in the decisions and policies adopted concerning them. This is the Principle of the Superior Interest of the Child, consecrated in article 9 of said Convention, which leads to the fact that any decision or measure taken in connection with the child must maximize the conditions that favor proper development of his autonomy, self-esteem, and the resources to develop it[3].

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[1] International treaty signed by Chile, which became law of the Republic on September 27, 1990.

[2] We share the position of the Convention on the Rights of the Child which, in its Article 1, indicates that child "means every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier."

[3] This principle was consecrated in Law No. 19585 (10/26/89) which modifies the filiation system in Chile. A clear manifestation of what is the guiding criterion in family matters is found in article 242 paragraph 2 of the Civil Code, which

Thus, the fact that currently children are considered at national and international level as subject of rights, implies recognizing them as beings independent from their parents, which their own rights and obligations, which many times they can enforce against the latter. Moreover, "children must no longer be regarded as parents' property, but must be recognized as individuals with their own rights and needs."[4] Such being the case, this principle implies "determining where the child can develop best, determining the best material and spiritual blossoming possible."[5]

2. In turn, in Chile, with the rise of democracy, the governments that succeeded each other have signed international human rights treaties to incorporate them as laws in the national legal system[6]. Although many international treaties have been signed, I am interested in stressing one which will be the object of my comments; I am referring to the Convention on the Civil Aspects of International Child Abduction, adopted by the Conference of The Hague on

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states: "In all events, to make his decisions, the judge will consider first and foremost the superior interest of the child, and will duly take into account his opinions, depending on his age and maturity."

[4] Recommendation 874 of the Parliamentary Assembly of the Council of Europe (1979), cited in Elisa PEREZ VERA, *Explanatory Report of the Official Reporter of the Convention of The Hague.* The Hague, The Netherlands, 1982, point 24.

[5] Leonor ETCHEBERRY COURT, "The rights and obligations between parents and children and patria potestas" in *The New Filiation Statute and Amendments to Succession Law*, Santiago, Chile, 1998, P. 105.

[6] Article 5, paragraph 2 of the Political Constitution of the State.

International Private Law in its 14th session on October 25, 1980—hereinafter the Convention of The Hague—which was published as law in Chile on June 17, 1994.

As was to be expected, the signing or adoption of these international treaties meant for Chile the need and the duty to adapt the Chilean legislation in force to those instruments. It is in this context that a series of legal initiatives came up in Chile to adapt the existing regulations to the international commitments assumed. Concretely, and for the purposes of this article, we must stress the enactment of Law No. 19585 (published in the Diario Oficial [Official Journal] of October 26, 1998), which modified the Civil Code and other bodies of law in matters of filiation[7]. Said law introduced deep changes in the treatment until then to children, depending on whether they were conceived or born in or out of wedlock to their parents. Among other issues, it also incorporated modifications in the effects of filiation, placing both parents in a situation of higher equality in relation to their children[8].

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[7] Concerning the first part of the third paragraph of the Message of His Excellency the President of the Republic introducing a Draft Law amending the Civil Code and other bodies of law in matters of filiation, which was later made into Law No. 19585, (Boletin [Bulletin] 1060-01-01, 08/10/93) indicates: The discriminations contained in our current legislation in matters of filiation are also contrary to the principles contained in the various international conventions on human rights to which Chile is a party and which, under the current article 5 of the Political Constitution, the agencies of the State have taken the commitment to enforce and promote."

[8] This equality between the parents was also a manifestation of the provisions of the Convention on the Rights of the

However, we must remember that in spite of the important effort made by the Chilean legislator to harmonize the Civil Code with other rules and provisions concerning family matters, unfortunately this effort did not reach certain rules whose modification or clarification would have helped the application and understanding of this international treaty which at the time was already law in Chile.

II. THE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION OF OCTOBER 25, 1980.

In recent years, globalization and the facility in transport and communications have allowed individuals to travel easily from one country to another, thus generating new and different family dynamics, such as the establishment of family relations with a national from another State, the moving of complete families to another state seeking better opportunities and living conditions, and cases of "families that, although they are formally integrated, are divided in their intimacy because one of the parents decides to leave the home and take the children with him or her."[9] Whatever the case, experience has demonstrated that in a great majority of situations, after a period of time one of the parents decides to return to his or her country of origin, taking the chil-

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Child in the first part of article 18 No. 1 which indicates, "The States' Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

[9] Adriana CANALES PEREZ, Magistrate at the Third Family Court of TSJDF. "Restitution of Minors" at the *Conference for the Institute of Legal Investigations UNAM*, Mexico, November 2005, p. 24.

dren along. This situation has originated in "an increasing international problem with consists, in broad terms of all situations which derive from the use of force to establish jurisdictional links on an international level, with a view to obtaining custody of a child."[10]

The States, aware of this dramatic reality, decided to sign the Convention on the Civil Aspects of the International Child Abduction in an effort to implement the principle of the superior interest of the child, consecrating the right of the child to "not to be removed or retained in the name of more or less arguable rights concerning its person"[11] and thus avoid perturbation in his stability, loss of contact with his other parent, and the anxiety or frustration that may mean having to adapt to a new language, different cultural conditions, and an unknown human environment.

Taking the above into consideration, this international treaty has two fundamental objectives, which are indicated in its article 1, to wit: 1) to restore the status quo, by securing the prompt return of children wrongfully removed to, or retained in any Contracting State and 2) to ensure that rights of custody and access under the law of one contracting State are effectively respected in the other Contracting States.

In other words, the Convention that pursues the return of a child to his usual place of residence when he has been moved from that place or wrongfully kept at another, in violation of the "right of custody" assigned to a person or institution under the

10 PEREZ VERA, (no. 4), point II.

11 PEREZ VERA, (no. 4), point 24.

law, a court or administrative decision, or under an agreement (still under the legal rules in force at the child's usual place of residence).

Such being the case, it is clear that one of the important elements to decide in applying this international instrument is what it understands by "right of custody,"[12] a concept which at times may not correspond to the notion of a member State to the convention about it.

The above is especially sensitive if we remember that in this matter there are at least two jurisdictions and two bodies of law intervening to decide the return of a child (that of the country of origin or usual residence and that of the host country or refuge country). In addition, those who must establish the wrongful nature of the move[13] or retention and consequently order the return of the child will be the countries of the refuge country, in other words, the country where the child is retained or where he was wrongfully transported. But to do so, the court must apply the laws of the State of the child's usual place of residence and quite specially, the provisions of the Convention of The Hague. The above has been especially difficult given the local criteria used in their reasoning and rulings the judges competent to hear these matters.

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[12] The original version of the Convention in English talks about the "*rights of custody*" and in French "*droit de garde.*" In Chile, when the Convention of The Hague was published, this original expression was translated as "derecho de tuicion" [right of guardianship].

[13] Article 3 of the Convention of The Hague indicates that the removal and/or the retention of a child is to be considered wrongful where it is in breach of rights of custody attributed to

III. CONCEPT OF CUSTODY (OR GUARDIANSHIP).

1. According to the Convention of The Hague.

Following tradition rooted in the Conference of The Hague[14], the Convention of The Hague does not define the legal concepts that it uses, but its article 5 indicates that "Rights of custody shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's usual place of residence." Consequently, although this instrument did not define the rights of custody, it was considered greatly important at least to clarify it, since an incorrect interpretation of its meaning could compromise the objectives of the Convention. And in addition, in order to be as precise as possible, it indicated as a manifestation of the "the care of the person of the child," the right to determine the child's place of residence.

In other words, in general terms, the rights of custody or guardianship according to the Convention of The Hague refer to the rights and duties concerning the person of the child and especially the possibility of the parent or parents who hold this right to determine his usual place of residence, in other words where the child will have the center of his life, where his relationships will be developed and where he will be formed as a person.

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a person under the law of the State in which the child was habitually resident immediately before the removal.

[14] The Conference of The Hague on the International Private Right is a global intergovernmental organization which absorbed various legal traditions. It develops international legal instruments that meet global needs and assures their operation.

2. According to the Chilean Civil Code.

We must remember that the original intents of the Executive Branch when proposing the enactment of Law No. 19585 which would amend the Civil Code and other bodies of law in matters of filiation in this aspect were different from those finally enacted in the law in question. Indeed, the draft was trying to respond to "an opinion extended in doctrine and recognized in various international instruments"[15] proposing to confirm "our legislation in our idea that prevails in the western world."[16] Concretely, the Message that accompanied the Presentation of this Draft Law to the National Congress established as the main idea grouping under the concept of *patria potestas* the financial aspect and the personal aspect of a filial relation: "5.1. First of all, *patria potestas* authority stops having the purely financial connotation it has always been given in our national legislation (despite of what happens in comparative law), and it will now also include the personal aspect, which involves the duty of the parents to supervise their children, take care of them, feed, and educate them, as well as the whole series of rights and obligations that exist in a filial relation."[17]

But finally the winner was the opinion of the Senators who wanted to keep the two institutions separate, "the distinction between the two institutions

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[15] Boletin No. 1060-07 "Report of the Commission of the Constitution, Legislation, Justice, and Regulation of the Senate."

[16] See No. 15.

[17] Message of His Excellency the President of the Republic introducing a Draft Law amending the Civil Code and other bodies of law in matters of filiation (No. 6).

established in the Civil Code responds to the convenience of using particular rules and criteria for the monetary aspects and for personal aspects. In our country, this system has an accumulation of doctrine and jurisprudence that has functioned satisfactorily and which would be impaired if we joined parental authority and *patria potestas*, without powerful reasons to do so, since the core consists of the rights and obligations that exist between parents and children."[18]

Thus, the personal care of the children was embodied in Title IX, Book 1 of the Civil Code, from article 222 to 242. And although it is not indicated expressly, the principles consecrated in these rules correspond to what the Roman legal tradition has called Parental Authority, understood as "the whole series of rights and obligations that arise between parents and children concerning the person of the child"[19] or "the whole series of rights and obligations with eminently moral content existing between parents and children,"[20] a right which actually in the tradition of the Chilean civil law has been assigned to both parents together.

Indeed, the mere reading of these rules clearly shows that this concept covers not only the personal care referred to in article 224 of the Civil Code, but also, inter alia, to the "right and duty of having a

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[18] See No. 15.

[19] Raúl ALVAREZ CRUZ, *Filiation and Other Reforms to the Civil Code. Law No. 19585*, Santiago, Chile, 1999, p. 151.

[20] René RAMOS PAZOS, *Family Law*, Santiago, Chile, Editorial Juridica de Chile, year 2000, Volume II, p. 420.

direct and regular relation"[21]—consecrated in article 229—held by the parent who does not live with his or her child, if they live separated. On this topic, Professor Carlos Peña indicated: "The general principle in Chile since the enactment of the Civil Code is for the parents to have the right to a direct and regular relation with their child regardless of which of them personally takes care of the child."[22]

Well now, at first glance it would seem that the new Chilean law would be perfectly adapted to the Convention of The Hague which had already been enacted in Chile in 1998 because, when speaking of the possession or custody rights, it includes the rights concerning the care of the person of the child, "leaving aside the possible ways of protecting the child's property."[23]

IV. STATEMENT OF THE PROBLEM

The "right of custody" referred to in the Convention of The Hague is a very broad right which under Chilean legislation does not exist as a single right, but is contained and regulated in various articles of various laws. In other words, Chile still does not have an organic body to systemize the attributes or aspects that include the guardianship or more precisely, the Parental Authority, which in a majority of

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[21] Law No. 19585 changed the vocabulary used until that time in Chilean legislation replacing the term "derecho do visitas" [visitation rights] by "derecho deber de tener una relación directa y regular" [right to have a direct and regular relation].

[22] Carlos PEÑA GONZALEZ, *Law Report*, Santiago, Chile, 2006, p. 2.

[23] PEREZ VERA (no. 4), point 84.

cases has meant that we are simply left with the rules contained in the Civil Code—which refer to the personal care of the child, the maintenance of a direct and regular relation, the correction of the child, the raising and education, and the duty to feed the child—and we leave aside others that contribute more aspects of this right, such as the right to determine the place of residence of the child[24], a right which, in turn, is closely related to the right of authorizing the travel of the child outside the country. Both effects of the guardianship are especially important for the purposes of the Convention of The Hague.

This lack of systematic character of the Chilean legislation to deal with the concept of guardianship and its attributes has many times translated into a clear injury of the principle that inspires these rules, namely the superior interest of the child, and has also meant ignoring the Clause of Benefit of the Children "which is also a criterion for selection among the various possible options that can be adopted in connection with them... under which, in the case of conflict, the interest of the children prevails, and the interest of the parents is sacrificed and steps aside."[25]

In addition, the exclusive application of the rules of the Chilean Civil Code without considering the other Chilean rules that refer to the guardianship or cus-

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[24] In the terms of the Convention of The Hague, the concept of Usual Place of Residence is a factual question different from the domicile.

[25] Luis DIEZ PICAZO, "*Full protection of the Children. Family and Law.*" Madrid, Spain, Editorial Civitas, 1984, pp. 175-176.

tody right has given rise to differences or contradictions in interpretation and/or application of the rules cited, causing severe distortions, particularly when a foreign court had to apply the Convention of The Hague according to Chilean legislation (if the usual place of residence of the child is in Chile and the child is retained in another country).

Specifically, this takes place when it is considered that the only rule applying to the case is article 225, paragraph 1 of the Chilean Civil Code, which mandates that "when the parents live separated the mother is entrusted with the personal care of the children."

The literal and isolated application of this rule has led to the fact that in Chile, the idea is rooted that when the parents live separately, the "guardianship" of the children is exercised by the mother exclusively, which is clearly inexact.

If we look at this problem in the sense of the provision in article 225 understood this way it could injure the superior interest of the child, Professor Enrique Barros Bourie indicated: "A rule that chooses the mother as in charge of the guardianship, without considering *ex ante* the interest of the child, gives the woman a decisive tactical advantage in the event of conflict with the father."[26] Even though Professor Barros was probably not thinking of a case of international abduction, his words clearly anticipate

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[26] Enrique BARROS BOURIE, "Historic and Comparative Notes on the New Filiation Statute" in *The New Filiation Statute in the Chilean Civil Code*, Santiago, Chile. Fundación Facultad de Derecho. University of Chile, LOM Publishers, 1989, p. 46.

a case of severe conflict between the parents, in which the main victims are the children.

V. INTERPRETATION OF ARTICLE 225, PARAGRAPH 1 OF THE CHILEAN CIVIL CODE.

When it is necessary to interpret the rule, it is well known that first of all it is necessary to look at its literal content. However, this element is not sufficient when said literal content is not at all clear. And this is what happens with article 225, paragraph 1 of the Civil Code which, when speaking of personal care, does not precisely describe what it means. And this lack of clarity is worse if we consider that our legislation does not contain any rule that expressly indicates what needs to be understood by guardianship, paternal authority, or custody. Consequently, it is not clear whether these terms are synonymous or if these terms include each other.

Thus, to correctly determine the meaning of this article, first of all it is necessary to remember the true history of the establishment of Law No. 19585, which allows determining with better clarity the spirit of the rule.

We have already indicated that during the process of this law, the original intent of the executive branch and many of the legislators was that *patria potestas* "has stopped having the financial connotation traditionally given to it in the national legislation, and it now also includes the personal aspect, which involves the duty of the parents to supervise their children, to take care of them, to feed, and educate

them as well as the whole series of rights and obligations that exist in a filial relation.[27]

In other words, the original idea—which in the end was not incorporated—was to join the paternal authority and *patria potestas*, in a single institution, which would be called *Patria Potestas*, and which would have as one of its attributes, the personal care of the children.

3. On the other hand, it is also necessary to remember that legal rules are not islands that are interpreted separately, but that, to the extent that there other rules on the same matter, their meaning must also be sought by trying to reach the best correspondence and harmony among all of them. This corresponds to the so-called systematic element of the interpretation of the law. This element should be used when interpreting said article 225, because there is another rule that complements it in the aspect of interest to us and which, although it is not in the Chilean Civil Code, it regulates an important aspect of the right to "guardianship" or "custody." I am referring to article 49 of the Minors Law No. 16,618, which precept contains the "right to authorize the travel of the minors outside the country." As already indicated, this is just another right of those included in the "right of guardianship" or "custody" mentioned in the Convention of The Hague and another one that includes the already mentioned concept of paternal authority.

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[27] Report of the Family Commission on the Draft Law amending the Civil Code and other bodies of law in matters of filiation (Boletin No. 1060-07). Session 39ª. Chamber of Deputies, 09/13/94, p. 4381.

This precept indicates the following: "If the guardianship of the child has not been entrusted by the judge to any of his parents or to a third party, the child cannot travel without the authorization of both parents[28] or of the parent who recognize him, if applicable."

If the guardianship is entrusted by the judge to one of the parents or to a third party, the child cannot travel other than with the authorization of the party to whom he was entrusted."

This means that in the absence of a Final Court Sentence giving the guardianship of the child to a certain person concerning the "right to authorize the travel of the minors outside the country," in Chile the "right of custody" is shared by both parents.

Consequently, if we apply article 225 of the Civil Code in its purest form, in other words we speak of legal guardianship (it is the law that determines the holder of the right of guardianship) and not a judicial one (given by a judge to one of the parents or a third party) or contractual (agreed upon by both parents) we consider that although the mother, living separate from the father, will be in charge of taking care of the children, this care cannot be understood to be held or exercised by her exclusively because should it be so, the ruling in article 49 of Law No. 16,618 would have no usefulness or reason for being.

Such being the case, we could sustain that article 225 of the Chilean Civil Code is the general rule and that article 49 of Law No. 16,618 would establish the specific rule in the case of the international move of

[28] Emphasis added by the author.

a child and, therefore, both rules must be interpreted harmoniously in order to make sense and be useful.

In other words, in the cases in which no Judge of the Republic of Chile granted the guardianship of the child to one of his parents or to a third party, the travel must be authorized by both. The above "in application of the general rule according to which the personal care is a consensual matter."[29] Consequently, we should understand that in this case, which is the general rule, the "right of guardianship" of the parents concerning the child is shared.

Indeed, if Chilean law orders that, for a child to leave the country where he resides (Chile), he needs the authorization of both parents, it is because it is a right held by both of them, in other words, neither one of them from the point of view of the law holds or can exercise the "right of custody" of the child independently, separately, and exclusively from the other parent. Moreover, if neither one of the parents has the right to take the child out of the country by himself or herself, they would even less have another attribute of this right of guardianship, namely the right to determine unilaterally the place of residence of the child.

It is therefore clear that article 225 is not enough in itself to explain the right of guardianship in Chile, because a mother who is separated from her child's father cannot take the child out of Chile by herself as long as she does not have the authorization of the father or of a court which, I repeat, would demonstrate that she does not have exclusive guardianship right concerning that child. Furthermore, a mani-

[29] PEÑA GONZALEZ, (No. 22), p. 7.

festation of this is that in practice, the Chilean courts when examining the cases related to the Convention of The Hague have never used article 225 of the Civil Code to deny the return of the child retained illegally in Chile, in spite of the fact that many times the mothers have invoked it in order to stay in Chile with their children.

It must be stressed that the text of the Convention of The Hague was also understood in this sense because, as indicated by the Official Report of the Conference of The Hague, Elisa Pérez Vera: "from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise."[30]

In addition, article 49 of Law No. 16,618 indicates expressly that "If it is not possible to grant, or in the absence of plausible motive, the authorization is denied for one of those who, under this article, must give it, it may be given by the family judge of the place of the residence of the minor. The judge, to authorize the travel of the minor in these cases, will take into consideration the benefit the child can obtain and will indicate the time for which he grants the authorization."

Consequently, if a parent leaves the country of his usual residence with his child, authorized by a court decision (because he could not obtain the autho-

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30 PEREZ VERA (No. 4), point 71.

rization of the other parent) this authorization is in any case limited (including over time) so that under no circumstances can it be sustained that the authorization would enable him or her to establish unilaterally one of the aspects of the right of guardianship already examined, namely changing the place of usual residence of the child.

Well now, if afterwards this parent violates the court authorization and remains abroad with the child for longer than allowed by the court, he or she would be violating article 3 of the Convention of The Hague (because he or she would be violating the right of guardianship of the other parent and, consequently, would be wrongfully retaining the child in the other country), which would cause the judicial authorities of the country where the child is found to order the immediate return of the child to his place of usual residence.

Moreover, the same article 49 expressly recognizes the provisions of article 229 of the Civil Code in the sense that the parents have the right and duty to maintain a direct and regular relation with their children and have a say in their education, except if a court declares that it would be damaging to the interest of the child.

Then, in its pertinent part it indicates, "After regulating the right referred to in article 229 of the Civil Code by court decision or a settlement approved by the court, authorization will also be required (for the child to leave the country[31]) from the father or mother in whose favor it was established." In other words, the fact that one of the parents has a system

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31 Editor's note.

of direct and regular relation decreed by a judge only confirms his or her possibility to continue exercising the guardianship right concerning the person of their child.

4. The above allows confirming what we have been saying, namely that in Chile the principle of equality of the parents and of the superior interest of the child means that when they are separated, the guardianship of their children is shared, since both have the right to decide on the most important matters that affect the life of the child (which would correspond to guardianship, custody, or paternal authority). Then, the parent (which in principle would be the mother under article 225, paragraph I) who lives with the child has the personal care of the child (which is different from guardianship) and the other parent would have the right-duty to maintain a system of direct and regular relation which would allow keeping contact, living together, and fluid and frequent communication with the child.

Then, the next question should be, how should we understand article 225 to make it useful and harmonious with the rest of the legal system?

It is clear that article 225 governs a factual situation which cannot be ignored and which arises when the parents of a child live separately and namely resolves with whom must a child live and, if we look at it more from a perspective of daily life, the idea is to answer who has "possession of the child"—an expression which, although it does not exist in Chile, it serves to illustrate the idea.

But the above is very different from sustaining that the mother has "*ipso jure*" *the* exclusive guardian-

ship of the child when she lives separated from the father. "Indeed, article 225 of the Civil Code gives the personal care to the mother; but this does not mean that it transfers to her everything traditionally understood as parental authority."[32]

It is clear, therefore, that the application of this international instrument in Chile made it, and still makes it, necessary to clarify the meaning of article 225 and other rules on guardianship. Indeed, when the Convention of The Hague speaks of the "care of the person of the child" it refers to a much broader concept than the concept of personal care existing in Chile. It refers not only to the physical living with the child day by day, but also includes in this expression the possibility of intervening in all the important decisions that must be made in the life of the child, such as whether or not to get a certain medical treatment, decide what type of education the child should receive, the religion with which he will be raised, decide in what place he will live, etc., because both are in charge and responsible for the welfare of their child. And it is precisely those decisions from which it is not possible to exclude the father who does not have the personal care of the child just because he lives separated from the mother.

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[32] PEÑA GONZALEZ. (No. 22). p. 3.

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I. ANTECEDENTES.

1. La dictación de la Convención sobre los Derechos del Niño de las Naciones Unidas[1] obedeció en su memento a un cambio en la mentalidad y en la cultura de los distintos Estados que se tradujo en reconocer a los niños[2] como sujetos de derecho, es decir, como una persona digna de respeto y consideración.

Concretamente este cambio en el modo de concebir a los niños se materializó en la consagración de un nuevo principio que desde ese memento ha sido el criterio rector en las materias que les afectan y en las decisiones y políticas que se adoptan respecto de ellos. Se trata del Principio del Interés Superior del Niño, consagrado en el articulo 9 de la citada Convención y que se traduce en que cualquier decisión o medida que se tome en relación al niño debe maximizar las condiciones que favorezcan un adecuado desarrollo de su autonomía, su autoestima y de los recursos para desarrollarla[3].

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[1] Tratado internacional suscrito por Chile, que se convirtió en ley de la República el 27 de septiembre de 1990.

[2] Hacemos nuestra la concepción de la Convención sobre los Derechos del Niña que en su Articulo 1° señala que se entiende por niño "todo set humano menor de dieciocho años de edad, salvo que en virtud de la ley que le sea aplicable, haya alcanzado antes la mayoria de edad".

[3] Este principio fue consagrado en la ley N° 19585 (26.10.89) que modificó el sistema de filiación en Chile. Una

De esta manera, el que los niños actualmente sean considerados tanto en el ámbito nacional como en el internacional, sujetos de derecho, implica reconocerlos como seres independientes de sus padres, con derechos y obligaciones propios, que incluso en muchos casos pueden hacer valer en contra de éstos. Más aún "los menores no deben ser considerados jamás como propiedad de los padres, sino que deben ser reconocidos como individuos con sus propios derechos y necesidades"[4]. Entonces, este principio implica "determinar dónde el hijo se podrá desarrollar mejor obteniendo una mayor realización material y espiritual posible"[5].

2. Por su parte, en Chile con el advenimiento de la democracia, los gobiernos de turno han ido suscribiendo tratados internacionales sobre derechos humanos con el objeto de que éstos se vayan incorporando como leyes en el ordenamiento jurídico nacional[6]. Si bien han sido muchos los

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manifestación clara de que es un criterio rector en materia de familia lo constituye el artículo 242 inciso 2° del Código Civil que dispone: "En todo caso, para adoptar sus resoluciones el juez atenderá como consideración primordial, al interés superior del hijo, y tendrá debidamente en cuenta sus opiniones, en función de su edad y madurez".

[4] Recomendación 874 de la Asamblea Parlamentaria del Consejo de Europa (1979), citada en PÉREZ VERA, Elisa, *Informe Explicativo de la Relatora Oficial de la Convención de La Haya*, La Haya, Holanda, 1982, punto 24.

[5] ETCHEBERRY COURT, Leonor. "Los derechos y obligaciones entre padres e hijos y la patria potestad" en *El Nuevo Estatuto Filiativo y las Modificaciones al Derecho Sucesorio*, Santiago. Chile, 1998, p. 105.

[6] Artículo 5 inciso 2° de la Constitución Política del Estado.

tratados internacionales suscritos, me interesa destacar uno que será el objeto de mis comentarios; me refiero a la Convención sobre los Aspectos Civiles de la Sustracción Internacional de Menores, adoptada por la Conferencia de La Haya sobre Derecho Internacional Privado en su 14° sesión el 25 de octubre de 1980 - en adelante la Convención de La Haya - la cual fue publicada como ley en Chile el 17 de Junio de 1994.

Como era de esperar, en muchos casos, el proceso de firma o suscripción de estos tratados internacionales, se tradujo para Chile en la necesidad y en el deber de adecuar la legislación chilena vigente a los referidos instrumentos. Y es en este contexto que en Chile surgieron una serie de iniciativas legales para adecuar la normativa existente a los compromisos internacionales asumidos. Concretamente y para Los fines de este articulo, cabe destacar la dictación de la Ley N° 19585 (publicada en el Diario Oficial el 26 de octubre de 1998) que modifico el Código Civil y otros cuerpos legales en materia de filiación[7].

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[7] Al respecto la primera parte del tercer párrafo del Mensaje de S. E. el Presidente de la República con el que se inicia un Proyecto de Ley que modifica el Código Civil y otros cuerpos legales en materia de filiación, que luego se tradujo en la Ley N° 19585, (Boletin 1060-01 1, 10.08.93) señala: "Las discriminaciones que nuestra actual legislación contiene en materia de filiación, además, son contrarias a los principios contenidos en las diversas convenciones internacionales sobre derechos humanos de las cuales Chile es parte y respecto de las cuales, de acuerdo con el actual articulo 5° de la Constitución Política, los órganos del Estado ban contraído el compromiso de hacer respetar y promover".

La referida ley introdujo cambios profundos en el tratamiento que hasta ese momento se les daba a los hijos, según hubiesen sido concebidos o nacidos dentro o fuera del matrimonio de sus padres. Entre otras materias, además incorporo modificaciones en los efectos de la filiación, situando a ambos padres en una situación de mayor igualdad en la relación con sus hijos.[8]

Sin embargo, cabe hacer presente que no obstante el importante esfuerzo que el legislador chileno realizó para armonizar el Código Civil con otras normas y disposiciones relativas a materias de familia, este esfuerzo desafortunadamente no alcanzó a algunas normas cuya modificación o aclaración habrían favorecido la aplicación y comprensión de este tratado internacional que en ese momento ya era ley en Chile.

II. LA CONVENCIÓN SOBRE LOS ASPECTOS CIVILES DE LA SUSTRACCIÓN INTERNACIONAL DE MENORES DE 25 DE OCTUBRE DE 1980.

En los últimos años, la globalización y la facilidad en el transporte y las comunicaciones han permitido que los individuos se desplacen fácilmente de un país a otro, generando así nuevas y distintas

[8] Esta igualdad entre los padres también fue una manifestación de lo dispuesto en la Convención sobre los Derechos del Niño en la primera parte del articulo 18 N° I que señala: "Los Estados partes pondrán el máxima empeño en garantizar el reconocimiento del principio de que ambos padres tienen obligaciones comunes en lo que respecta a la crianza y desarrollo del niño.

dinámicas familiares, tales como el establecimiento de relaciones de familia con un nacional de otro estado, el traslado de familias completas a otro Estado en busca de mejores oportunidades y condiciones de vida y casos de "familias que si bien se encuentran integradas formalmente están desechas en su intimidad por lo que uno de los progenitores decide salirse del domicilio que habitualmente ocupa y se lleva a los hijos"[9]. Cualquiera sea el caso, la experiencia ha demostrado que en la gran mayoría de las situaciones, luego de un tiempo uno de los padres decide regresar a su país de origen incluyendo en el retorno a sus hijos. Esta situación ha originado un "problema cada vez mayor a nivel internacional y que consiste en términos amplios en todas aquellas situaciones que derivan del uso de la fuerza para establecer los vínculos jurisdiccionales a nivel internacional con miras a la obtención de la tenencia de un niño"[10].

Los Estados, concientes de esta dramática realidad, acordaron suscribir la Convención sobre los Aspectos Civiles de la Sustracción Internacional de Menores en un esfuerzo por implementar el principio del interés superior del niño, consagrando el derecho del niño a "no ser trasladado ni retenido, en el nombre de derechos mas o menos argumentables respecto de su persona"[11] y evitar

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9 CANALES PÉREZ, Adriana. Magistrado de la Tercera Sala en lo Familiar del TSJDF. "Restitución de Menores" en *Conferencia para el Instituto de Investigaciones Jurídicas. UNAM*. México, Noviembre 2005, p.24.

10 PÉREZ VERA, (n. 4), punto 11.

11 PÉREZ VERA, (n. 4), punto 24.

asi, la perturbación en su estabilidad, la pérdida de contacto con su otro padre y la ansiedad o frustración que puede significar el tener que adaptarse a un nuevo idioma, a condiciones culturales diferentes y a un entorno humano desconocido.

Teniendo en consideración lo anterior, este tratado internacional tiene dos objetivos fundamentales, los que están señalados en su articulo 1, a saber: 1) restaurar el status quo, por media de asegurar el inmediato regreso de los niños trasladados o retenidos ilícitamente en cualquier Estado Contratante y 2) hacer respetar efectivamente en los demás Estados Contratantes los derechos de tuición y de visita existentes en un Estado Contratante.

Es decir, la Convención persigue la restitución de un niño a su lugar de residencia habitual cuando éste ha sido trasladado de dicho lugar o retenido ilícitamente en otro, en violación de un "derecho de custodia" asignado a una persona o institución en virtud de la ley, de una resolución judicial o administrativa o en virtud de un acuerdo (siempre según las normas legales vigentes en el lugar de residencia habitual del niño).

Es claro entonces que uno de los elementos importantes para decidir aplicar este instrumento internacional, es qué entiende este par "derecho de custodia"[12], concepto que en ocasiones puede no

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[12] La versión original de la Convención en ingles habla de *"rights of custody"* y en francés de *"droit de garde"*. En Chile, al publicarse la Convención de La Haya esta expresión original se tradujo como "derecho de tuición".

corresponder a la noción que tenga un Estado parte de la Convención sobre el mismo.

Lo anterior es especialmente sensible si se tiene presente que en esta materia existen al menos dos jurisdicciones y dos legislaciones interviniendo para decidir la restitución de un niño (la del país de origen o de su residencia habitual y la del país de recepción a de refugio). Además quien debe establecer la naturaleza ilegal del traslado[13] o de la retención y consecuentemente ordenar la restitución del niño, serán los tribunales del país de refugio, esto es, el país donde el niño se encuentra retenido o donde ha sido trasladado ilícitamente. Pero para esto, dicho tribunal deberá aplicar las leyes del Estado del lugar de residencia habitual del niño y muy especialmente, lo dispuesto en la Convención de la Haya. Lo anterior ha sido especialmente difícil atendido los criterios localistas con que razonan y fallan los jueces competentes para conocer estas materias.

III. CONCEPTO DE CUSTODIA (O TUICIÓN).

1. De acuerdo a la Convención de La Haya.

Siguiendo una tradición arraigada en la Conferencia de La Haya[14], la Convención de La Haya no define

[13] El articulo 3 de la Convención de La Haya señala que el traslado y/o la retención se considera ilícita, cuando se ha producido con infracción a un derecho de custodia atribuido a una persona con arreglo al derecho vigente en el estado en que el niño o niña tenia su residencia habitual inmediatamente antes de la retención.

[14] La Conferencia de La Haya sobre Derecho International Privado es una organización intergubernamental mundial en la

los conceptos legales que utiliza, sin embargo su articulo 5 señala que "El derecho de custodia comprenderá el derecho relativo a los cuidados de la persona del niño y en particular, el derecho a determinar su lugar de residencia habitual". De manera que si bien este instrumento no definió el derecho de custodia, se consideró de gran importancia al menos aclararlo, ya que una interpretación incorrecta de su significado podría comprometer los objetivos de la Convención. Y además con el objeto de ser lo más precisa posible, destacó como una manifestación del "cuidado de la persona del niño", el derecho de determinar el lugar de residencia de éste.

Es decir, en términos generales, el derecho de custodia o tuición para la Convención de La Haya, se refiere a los derechos y deberes respecto de la persona del niño, y especialmente a la posibilidad que tiene el padre, o los padres titulares de este derecho, a determinar su lugar de residencia habitual, es decir, dónde el niño tendrá su centro de vida, dónde se desarrollarán sus relaciones y dónde se formará como persona.

2. De acuerdo al Código Civil chileno.

Cabe hacer presente que las intenciones originales del Poder Ejecutivo al proponer la dictación de la ley N° 19585 que modificaría el Código Civil y otros cuerpos legales en materia de filiación en este aspecto, eran distintas a las que finalmente se plasmaron en la ley en cuestión. En efecto, el proyecto buscaba responder "a una opinión

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cual confluyen distintas tradiciones jurídicas. Desarrolla instrumentos jurídicos internacionales que responden a necesidades globales y asegura el funcionamiento de ellos.

extendida en la doctrina y reconocida en diversos instrumentos internacionales[15] proponiendo homologar "nuestra legislación al criterio que prevalece en el mundo occidental"[16]. Concretamente, el Mensaje que acompañó la presentación del Proyecto de esta Ley al Congreso Nacional establecía como idea matriz agrupar bajo el concepto de patria potestad el aspecto patrimonial y el aspecto personal de una relación filial: "5.1. En primer lugar, la patria potestad deja de tener la connotación puramente patrimonial que siempre se le ha dado en nuestra legislación nacional (a pesar de lo que sucede en la legislación comparada), pasando a considerarse dentro de ella, también el aspecto personal, que involucra el deber de los padres de velar por sus hijos, cuidarlos, alimentarlos y educarlos, así como el conjunto de derechos y obligaciones que existen en una relación filial"[17].

Pero finalmente primo la opinión de aquellos senadores que querían mantener separadas las dos instituciones: "la distinción entre ambas instituciones que establece el Código Civil responde a la conveniencia de utilizar normas y criterios particulares para los aspectos pecuniarios y para los de orden personal. Este sistema tiene en nuestro país un cúmulo de doctrina y jurisprudencia que ha funcionado satisfactoriamente y se verá afectada al

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15 Boletín 1060-07 "Informe de la Comisión de Constitución, Legislación, Justicia y Reglamento del Senado".

16 Ver n.15.

17 Mensaje de S.E. el Presidente de la República con el que inicia un Proyecto de Ley que modifica el Código Civil y otros cuerpos legales en materia de filiación (n.6)

unir la autoridad paterna y la patria potestad, sin que existan motivos poderosos para hacerlo, pues lo medular consiste en los derechos y obligaciones que median entre padres e hijos"[18].

De esta manera entonces, el cuidado personal de los hijos quedó plasmado en el Titulo IX del Libro I del Código Civil, entre los artículos 222 a 242. Y si bien no lo expresamente, lo consagrado en estas normas corresponde a lo que la tradición jurídica románica ha denominado Autoridad Paterna entendiendo por tal "el conjunto de derechos y obligaciones que surgen, entre padres e hijos, relativos a la persona del hijo"[19] o "como el conjunto de derechos y obligaciones de contenido eminentemente moral existente entre padres e hijos"[20], derecho que por lo demás, la tradición del derecho civil chileno ha asignado a ambos padres de consuno.

En efecto, de la sola lectura de estas normas se desprende claramente que este concepto abarca no sólo el cuidado personal a que se refiere el articulo 224 del Código Civil, sino que también se refiere entre otros, al "derecho deber de tener una relación directa y regular"[21] — consagrado en el articulo 229 — y de que es titular el padre que no vive con su hijo, en caso que estos vivan separados. Sobre el

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[18] Ver n.15.19

[19] ALVAREZ CRUZ, Raúl. *La Filiación y Otras Reformas al Código Civil. Ley A 19585*, Santiago de Chile, 1999, p. 151.

[20] RAMOS PAZOS, René *Derecho de Familia*, Santiago de Chile, Editorial Jurídica de Chile, ano 2000, Tomo II, p. 420.

[21] La ley 19585 cambio la nomenclatura usada hasta ese momento en la legislación chilena, reemplazando el termino "derecho de visitas" por el de "derecho deber de tener una relación directa y regular".

particular el profesor Carlos Peña ha señalado: "El principio general en Chile desde la entrada en vigencia del Código Civil es que los padres tienen derecho a una relación directa y regular con su hijo, no obstante a cual de ellos corresponda el cuidado personal"[22].

Ahora bien, a simple vista pareciera que la nueva ley chilena, se adaptaría perfectamente a la Convención de La Haya que ya regia en Chile en el ano 1998, pues al hablar de derechos de tenencia o custodia incluye los derechos relativos al cuidado de la persona del niño, "dejando de lado las maneras posibles de proteger los bienes del menor"[23].

IV. PLANTEAMIENTO DEL PROBLEMA

El "derecho de custodia" a que se refiere la Convención de La Haya es un derecho muy amplio que en la legislación chilena no existe como un solo derecho, sine que se encuentra contenido y regulado en diferentes artículos contenidos en leyes distintas. Es decir, Chile áun no cuenta con un cuerpo orgánico que sistematice los atributos o aspectos que comprende la tuición o más precisamente, la Autoridad Paterna, lo que en la mayoría de los casos ha significado que nos quedemos simplemente con las normas contenidas en el Código Civil — que se refieren al cuidado personal del hijo, a la mantención de una relación directa y regular, a la corrección del hijo, a la crianza y educación y al deber de alimentos — y dejemos de lado otras que aportan más aspectos de este derecho, tales como el

[22] PEÑA GONZALEZ, Carlos. *Informe en Derecho*, Santiago de Chile. 2006, p.2.

[23] PÉREZ VERA (n. 4), punto 84.

derecho a determinar el lugar de residencia del hijo[24], derecho que a su vez está íntimamente ligado al derecho a autorizar la salida del hijo del país; ambos efectos de la tuición que son especialmente importantes para los fines de la Convención de La Haya.

Esta falta de sistematicidad de la legislación chilena para tratar el concepto de tuición y sus atributos, en mochas ocasiones se ha traducido en una clara lesión al principio inspirador de estas normas, cual es el interés superior de niño, y también ha significado ignorar la Cláusula de Beneficio de los Hijos "que constituye también un criterio de selección, entre las diferentes y eventuales opciones que en relación con ellos se pueden adoptar.... en virtud de la cual en caso de conflicto, el interés de los hijos prepondera y el interés de los padres se sacrifica y cede"[25].

Además la aplicación exclusiva de las normas del Código Civil chileno sin considerar las otras normas chilenas que se refieren a la tuición o derecho de custodia ha dado lugar a diferencias o contradicciones de interpretación y/o aplicación de las normas citadas causándose graves distorsiones, especialmente cuando un tribunal extranjero ha debido aplicar la Convención de La Haya de acuerdo a

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[24] En los términos de la Convención de La Haya, el concepto de Residencia Habitual es una cuestión de hecho, distinta del domicilio.

[25] DIEZ PICAZO, Luis, "*Protección integral de los hijos. Familia y Derecho*". Madrid, España, Editorial Civetas, 1984, pp. 175 – 176.

la legislación chilena (en caso que el lugar de residencia habitual del niño sea Chile y éste se encuentra retenido en otro país).

Específicamente, lo anterior se produce cuando se considera como norma de aplicación exclusiva al caso, el articulo 225 inciso I° del Código Civil chileno que dispone que "cuando los padres viven separados, a la madre toca el cuidado personal de los hijos".

La aplicación literal y aislada de esta norma ha hecho que en Chile esté arraigada la idea de que cuando los padres viven separados la "tuición" de los hijos la ejerce la madre en forma exclusiva, lo que claramente es una imprecisión.

Vislumbrando este problema, en el sentido que la norma del articulo 225 así entendida podía acarrear una lesión al interés superior del niño, es que el profesor Enrique Barros Bourie ha señalado: "Una regla que opta por la madre como titular de la tuición, sin consideración ex ante del interés del niño, otorga a la mujer una ventaja táctica decisiva en caso de conflicto con el padre"[26]. Si bien probablemente el profesor Barros no estaba pensando en un caso de sustracción internacional, sus palabras anticipan con claridad un caso de conflicto grave entre los padres que tiene como principal victima a los niños.

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[26] BARROS BOURIE, Enrique, "Notas Históricas y Comparadas sobre el Nuevo Ordenamiento Legal de la Filiación" en *El Nuevo Estatuto de Filiación en el Código Civil chileno*. Santiago de Chile, Fundación Facultad de Derecho, Universidad de Chile, LOM Ediciones, 1989. p.46.

V. INTERPRETACION DEL ARTÍCULO 225 INCISO 1° DEL CÓDIGO CIVIL CHILENO.

1. Cuando se trata de interpretar una norma, es sabido que en primer lugar se debe estar al tenor literal de ésta. Sin embargo, este elemento no es suficiente cuando el mencionado tenor literal no es del todo claro. Y esto es lo que ocurre en el caso del articulo 225 inciso 1° del Código Civil el cual al hablar de cuidado personal, no describe con precisión en qué consiste éste. Y esta falta de claridad se acentúa si consideramos que nuestra legislación no contiene una norma que expresamente señale qué debe entenderse por tuición, autoridad paterna o custodia. De manera que no está claro si estamos ante términos sinónimos o ante términos comprensivos uno del otro.

2. De esta manera, para determinar correctamente el sentido de este articulo, en primer lugar, es necesario tener presente la historia fidedigna del establecimiento de la Ley N° 19585, la que permite determinar con mayor claridad cuál es el espíritu de dicha norma. Ya hemos señalado que durante la tramitación de esta ley la intención original del poder ejecutivo y de parte importante de los legisladores era que la patria potestad "ha dejado de tener la connotación patrimonial que tradicionalmente se le ha dado en la legislación nacional, pasando a considerarse dentro de ella también, el aspecto personal, que involucra el deber de los padres de velar por sus hijos, de cuidarlos, alimentarlos y educarlos, así como el conjunto de

derechos y obligaciones que existen en una relación filial".[27]

Es decir, la idea original – **que finalmente no fue incorporada** - era unir la autoridad paterna y la patria potestad en una sola institución, que pasaría a llamarse Patria Potestad, y coma uno de los atributos de ésta se encontraría el cuidado personal de los hijos.

3. Por otro lado, es necesario tener presente asimismo que las normas legales no son islas que se interpretan separadamente, sino que en la medida que existen otras normas sobre una misma materia, su sentido habrá que buscarlo también tratando de alcanzar la mayor correspondencia y armonía entre todas ellas. Lo anterior corresponde al llamado elemento sistemático de interpretación de la ley. Y usando este elemento es que debería interpretarse el citado articulo 225, pues existe otra norma que lo complementa en el aspecto de nuestro interés y que no obstante no encontrarse en el Código Civil chileno regula un aspecto importante del derecho de "tuición" o "custodia". Me refiero al articulo 49 de la Ley de Menores N° 16.618, precepto que contiene el "derecho para autorizar la salida de menores del país". Derecho que como ya se señaló es uno más de los que comprende el "derecho de tuición" o "custodia" a que se refiere la Convención de La Haya y uno más de los que comprende el concepto de autoridad paterna ya referido.

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[27] Informe de la Comisión de Familia recaído en el proyecto de ley que modifica el Código Civil y otros cuerpos legales en materia de filiación (Boletín N° 1060-07). Sesión 39° Cámara de Diputados, 13.09.94, p. 4381.

Dicho precepto señala lo siguiente: "Si la tuición del hijo no ha sido confiada por el juez a alguno de sus padres ni a un tercero, aquél no podrá salir sin la autorización de ambos padres[28] o de aquel que lo hubiere reconocido, en su caso".

Confiada por el juez la tuición a uno de los padres o a un tercero, el hijo no podrá salir sino con la autorización de aquél a quien se hubiere confiado".

Esto significa, que de no existir una Sentencia Judicial Firme que otorgue la tuición del niño a una persona determinada, en lo que respecta al "derecho para autorizar la salida de menores del país", en Chile el "derecho de custodia" es compartido por ambos padres.

En consecuencia, si aplicamos el articulo 225 del Código Civil en su forma más pura, es decir, hablamos de una tuición legal (es la ley la que determina el titular del derecho de tuición) y no de una judicial (otorgada por un juez a uno de los padres o a un tercero) ni convencional (acordada por ambos padres) tenemos que si bien la madre, al estar viviendo separada del padre, tendrá el cuidado de los hijos, este cuidado no puede entenderse que lo tiene ni que lo puede ejercer en forma exclusiva ya que de ser así, la norma del articulo 49 de la ley N° 16.618, no tendría ninguna utilidad ni razón de existir.

Podríamos sostener entonces, que el artículo 225 del Código Civil chileno, es la norma general y que el articulo 49 de la Ley N° 16.618 establecería la norma específica para el caso de traslado internacional de un niño, y por lo tanto ambas normas deben ser inter-

[28] El subrayado es del autor.

pretadas armónicamente a fin de que tengan sentido y utilidad.

Es decir, en los casos en que ningún Juez de la República de Chile haya otorgado la tuición del niño a uno de sus padres o a un tercero, la salida deberá ser autorizada por ambos. Lo anterior "en aplicación de la regla general conforme a la cual, el cuidado personal es de consuno"[29]. En consecuencia, deberíamos entender que en este caso, que constituye la regla general, el "derecho de tuición" de los padres respecto de ese hijo es compartido.

En efecto, si la ley chilena dispone que para que un niño salga del país donde reside (Chile) es necesario la autorización de ambos padres, es porque se trata de un derecho del que ambos son titulares, es decir, ninguno de ellos, desde el punto de vista de la ley, es titular ni puede ejercer el "derecho de custodia" del niño en forma independiente, separada y exclusiva del otro progenitor. A mayor abundamiento, si ninguno de los padres tiene el derecho de sacar al niño del país por sí solo, menos tendrá otro atributo de este derecho de tuición, cual es el derecho de determinar unilateralmente el lugar de residencia del niño.

Es claro entonces, que el articulo 225 no se basta a sí mismo para explicar el derecho de tuición en Chile, pues una madre que se encuentra separada del padre de su hijo, no puede por si sola sacar a su hijo de Chile, mientras no cuente con la autorización del padre o de un tribunal, lo que – reitero - demostraría que no tiene la tuición exclusiva respecto de ese hijo. Incluso, una manifestación de

[29] PEÑA GONZALEZ, (n. 22), p. 7.

esto es que en la practica, los tribunales chilenos al tramitar las causas relativas a la Convención de la Haya nunca han utilizado el articulo 225 del Código Civil para negar la restitución de un niño retenido ilícitamente en Chile, a pesar de que en varias oportunidades las madres lo hayan invocado con el objeto de permanecer en Chile con sus hijos.

Cabe destacar que el texto de la Convención de La Haya también se ha entendido en este sentido, pues coma señala la Relatora Oficial de la Conferencia de La Haya, Elisa Pérez Vera: "desde el punto de vista de la Convención, el traslado de un menor por una de las partes que conjuntamente ejerce et derecho de tenencia sin el consentimiento de la otra parte, es igualmente ilegal, y esta ilegalidad deriva en este caso particular, no de alguna acción de incumplimiento de un derecho particular, sino del hecho de que dicha acción ha ignorado los derechos del otro padre que están también protegidos por ley, y ha interferido con su ejercicio normal"[30].

Además el articulo 49 de la ley N° 16618 señala expresamente que "En caso de que no pudiere otorgarse o sin motivo plausible se negare la autorización por uno de aquellos que en virtud de este articulo debe prestarla, podrá ser otorgada por el juez de letras de menores del lugar en que tenga su residencia el menor. El juez, para autorizar la salida del menor en estos casos, tomará en consideración el beneficio que le pudiere reportar y señalará el tiempo por el que concede la autorización".

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30 PEREZ VERA (n. 4), punto 71.

En consecuencia, si un progenitor sale con su hijo del país de su residencia habitual autorizado por una resolución judicial (pues no pudo obtener la autorización del otro padre), esta autorización es en todo caso limitada (incluso en el tiempo) por lo que en ningún caso se podría sostener que dicha autorización lo habilitaría para ejercer en forma unilateral uno de los aspectos del derecho de tuición ya vistos, cual es el cambiar el lugar de residencia habitual del niño.

Ahora bien, si este padre luego viola dicha autorización judicial y permanece con su hijo en el extranjero más tiempo del que judicialmente se le ha permitido, estaría contraviniendo el articulo 3° de la Convención de La Haya (pues estaría lesionando el derecho de tuición del otro padre y, en consecuencia, reteniendo ilicitamente al niño en otro país), lo que daría lugar a que las autoridades judiciales del país donde se encuentre el niño ordenen el inmediato regreso de éste a su lugar de residencia habitual.

A mayor abundamiento, el mismo articulo 49 reconoce expresamente lo dispuesto en el articulo 229 del Código Civil, en el sentido que los padres tienen el derecho y el deber de mantener una relación directa y regular con sus hijos e incidir en su educación, salvo que un tribunal declare que perjudicaría el interés del niño.

Luego en su parte pertinente señala: "Regulado el derecho a que se refiere el articulo 229 del Código Civil por sentencia judicial a avenimiento aprobado por el tribunal, se requerirá también la autorización (para que el niño salga del país[31]) del padre o madre

[31] N del Ed.

a cuyo favor se estableció". Es decir, el que uno de los padres tenga un régimen de relación directa y regular decretado por un juez sólo le confirma la posibilidad de seguir ejerciendo su derecho de tuición respecto de la persona de su hijo.

4. Lo anterior, permite entonces confirmar lo que hemos venido diciendo, en el sentido de que en Chile el principio de igualdad de los padres y del interés superior del niño se traduce en que cuando ellos están separados la tuición respecto de sus hijos es compartida, pues ambos tienen el derecho a decidir sobre los asuntos mas importantes que afecten la vida del hijo (que correspondería a la tuición, la custodia o a la autoridad paterna). Luego, el progenitor (que en principio será la madre en virtud del articulo 225 inciso 1°) que vive con el niño tiene el cuidado personal de éste (que es distinto de la tuición) y el otro progenitor será titular del derecho-deber de mantener un régimen de relación directa y regular, que le permita mantener con su hijo un contacto, una convivencia y una comunicación fluida y frecuente con él.

Entonces, la pregunta que cabe hacerse a continuación, es ¿Cómo debemos entender el citado articulo 225 para que sea útily armónico en relación con el resto del ordenamiento jurídico?

Es claro que el articulo 225 regula una situación de hecho que no es posible ignorar que se produce cuando los padres de un niño viven separados y es la que se refiere a solucionar con quién deberá vivir el niño, y mirado desde una perspectiva más cotidiana, persigue responder quién tiene la "tenencia del niño" – expresión que si bien en Chile no existe, sirve para ilustrar la idea.

Pero lo anterior es muy distinto a sostener que la madre tenga "de pleno derecho" la tuición exclusiva del hijo cuando vive separada del padre. "En efecto, el articulo 225 del Código Civil entrega el cuidado personal a la madre; pero ello no importa transferirle la totalidad de lo que tradicionalmente se entendía por autoridad paterna.[32]

Es claro entonces, que la aplicación de este instrumento internacional en Chile hacia - y hace - necesario aclarar el sentido del articulo 225 y de las demás normas sobre tuición. En efecto, cuando la Convención de La Haya habla de "cuidado sobre la persona del hijo" se refiere a un concepto mucho mas amplio que el concepto de cuidado personal existente en Chile. Se está refiriendo no sólo a la convivencia física con el niño día a día, sino que también comprende en esa expresión la posibilidad de intervenir en todas las decisiones más importantes que deben tomarse en la vida de ese hijo, tales como practicar a no un determinado tratamiento médico, decidir qué tipo de educación recibirá, bajo qué religión será formado, decidir en qué lugar vivirá, etc. pues a los dos les compete y son responsables del bienestar de su hijo. Y es precisamente de esas decisiones de las que no se puede excluir al padre que no tiene el cuidado personal del hijo par el solo hecho de estar viviendo separado de la madre.

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[32] PEÑA GONZALEZ (n. 22), p3.

APPENDIX G

CURRICULUM VITAE

1. Personal Information

Name	:	Bernardita Briones Maira
Date of Birth	:	April 1, 1970
Status	:	Married
Citizenship	:	Chilean
Address	:	Torremolinos 564, Las Condes, Santiago
Telephone	:	56-2-2209397/09-5093092
Email	:	tatabmcl@yahoo.com.ar

2. Education

2.1 Higher Education

1995-1997	:	Master of European Studies, Autonomous University of Barcelona, Spain. Thesis: Analysis of the Evolution of Relations between the European Community and Chile in light of the June 22, 2006 Agreement
1994	:	Law Degree
1993	:	Bachelor's degree in Juridical and Social Sciences, Law School, University Diego Portales
1988-1992	:	Law, University Diego Portales

2.2 Primary and Secondary Education

1985-1987	: Our Lady of Pilar High School, Santiago, Chile
1976-1984	: Teresianas de Las Condes Elementary and Junior High School, Santiago, Chile

3. Work Experience

February 2006 - May 2006	Attorney in the Office of International Procedure of the Corporation of Judicial Assistance (Central Authority for the Application of The Hague Convention on Certain Civil Aspects of International Child Abduction), Metropolitan Region
September 2004 - April 2005	Chief Attorney in the Office of International Procedure of the Corporation of Judicial Assistance (Central Authority for the Application of The Hague Convention on Certain Civil Aspects of International Child Abduction), Metropolitan Region

September 2002 - March 2003	:	Litigating Attorney, HSBC Bank USA (formerly Republic National Bank of New York)
April 1998 - March 2002	:	Litigating Attorney, HSBC Bank USA (formerly Republic National Bank of New York)
March 1994 - August 1995	:	Executive Secretary, Fernando Fueyo Laneri Foundation
December 1993 - August 1995		Solicitor and Fiscal Attorney for the Central Bank of Chile
July 1992 - March 1993	:	General Counsel for the Committee of the State's Civil Defense
April 1991 to June 1992		Attorney at Maira, Valenzuela and Co. Law Firm

4. Academia and Educational Activities

March 2001 - present	Professor of Civil Law, University Diego Portales

June 2005 and 2006	Professor of Family Law, University Alberto Hurtado
December 2003	Training for the Affiliation of Practicing and Organized Judges for the Judicial Academy
December 2001 to December 2002	: Professor of Civil Law, University Alberto Hurtado
March 2001 to December 2001	Teaching Assistant in Civil Law, University Alberto Hurtado
August 2000 to December 2000	: Teaching Assistant in Introduction to Law, University Alberto Hurtado
March 1998 to September 1998	: Teaching Assistant for the Judicial Clinics, University Diego Portales
April 1993 - March 2001	Assistant at the Department of Civil Law, University Diego Portales

Responsible for the edition and correction of the publications "Modifications to the Civil and Commercial Code" made by the Fernando Fueyo Foundation

Assisted Professor Leonor Etcheberry C. in the creation and edition of the Manual for Child Support published by SERNAM

Assigned by the Foundation to update the book "Compliance and Unperformed Obligations" published by Professor Fernande Fueyo L.

Translator (into Spanish) and editor for the book "Civil Contract Responsibility—Some Modern Themes" by professor Christian Larroumet, Juridical Editor of Chile

CURRICULUM VITAE

1. ANTECEDENTES PERSONALES

Nombre	:	Bernardita Briones Maira
Fecha de Nacimiento	:	01 de abril de 1970
Estado Civil	:	Casada
Nacionalidad	:	Chilena
Dirección	:	Torremolinos 564, Las Condos, Santiago
Teléfono	:	56-2-2209397/09-5093092
Correo electrónico	:	tatabmcl@yahoo.com.ar

2. EDUCACIÓN

2.1 EDUCACIÓN SUPERIOR

1995-1997	:	Máster en Estudios Europeos. Universidad Autónoma de Barcelona, España. Memoria: Análisis de la Evolución de las Relaciones entre la Comunidad Europea y Chile a la luz del Acuerdo del 22.06.96.
1994	:	Titulo de Abogado.
1993	:	Licenciada en Ciencias Juridicas y Sociales, Facultad de Derecho, Universidad Diego Portales.

1988-1992 : Derecho, Universidad Diego Portales.

2.2 EDUCACIÓN PRIMARIA Y SECUNDARIA

1985-1987 : Colegio Nuestra Señora del Pilar, Santiago, Chile.

1976-1984 : Colegio Teresianas de Las Condes, Santiago, Chile.

3. EXPERIENCIA LABORAL Y DOCENTE

Febrero 2006
a mayo 2006 : Abogada de la Oficina de Tramitación Internacional de la Corporación de Asistencia Judicial (Autoridad Central para la aplicación de la Convención de La Haya sobre los Aspectos Civiles de la Sustracción Internacional de Menores). Región Metropolitana.

Septiembre 2004
a abril de 2005 : Abogada Jefe (S) de la Oficina de Tramitación Internacional de la Corporación de Asistencia Judicial (Autoridad Central para la aplicación de la Convención de La Haya sobre los Aspectos

	Civiles de la Sustracción Internacional de Menores), Región Metropolitana.
Septiembre 2002 a marzo 2003	: Abogada Fiscalía Banco HSBC Bank USA ex Republic National Bank of New York.
Abril 1998 a marzo 2002	: Abogada Fiscalía Banco HSBC Bank USA ex Republic National Bank of New York.
Marzo 1994 a agosto 1995	: Secretaria Ejecutiva Fundación Fernando Fueyo Laneri
Diciembre 1993 a agosto 1995	: Procuradora y posteriormente Abogada Fiscalía Banco Central de Chile.
Julio 1992 a marzo 1993	: Procuradora Consejo de Defensa del Estado, Procuraduría Civil.
Abril 1991 a junio 1992	: Procuradora Estudio Juridico Maira, Valenzuela y Cía.

4 ACTIVIDADES ACADEMICAS Y DOCENTES

Marzo 2001 a la fecha	: Protesora dc Derecho Civil, Universidad Diego Portales
Junio 2005 y 2006	: Protesora del Diplomado de Derecho de Familia, Universidad Alberto Hurtado.
Diciembre 2003	: Curso de capacitación para jueces organizados por la Academia Judicial en materia de filiación.
Diciembre 2001 a diciembre 2002	: Profesora de Derecho Civil, Universidad Alberto Hurtado
Marzo 2001 a diciembre 2001	: Ayudante de Derecho Civil, Universidad Alberto Hurtado
Agosto 2000 a diciembre 2000	: Ayudante de Introducción at Derecho, Universidad Alberto Hurtado.
Marzo 1998 a Septiembre 1998	: Ayudante del Departamento de Clínicas Jurídicas. Universidad Diego Portales

Abril 1993
a marzo 2001 : Ayudante del Departamento Derecho Civil, Universidad Diego Portales

Encargada de la edición y correción de las publicaciones sobre "Modificaciones a las Códigos Civil y de Comercio", Fundación Fernando Fueyo.

Asistente de la Profesora Leonor Etcheberry C. en la elaboración y redacción de un Manual sobre Derecho de Alimentos encargado por el SERNAM.

Actualización del libro "Cumplimiento e Incumplimiento de las Obligaciones" del profesor Fernando Fueyo L. por encargo de la Fundación Fueyo.

Corrección de la traducción al castellano del libro "Responsabilidad Civil Contractual. Algunos temas modernos" del profesor Christian Larroumet, Editorial Jurídica de Chile.

APPENDIX H

BEST AVAILABLE COPY

OPPOSITION BRIEF

(3)

No. 08-775

FILED
MAR 13 2009
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

HUGO ALEJANDRO VILLEGAS DURAN,

Petitioner,

v.

JOHANA IVETTE ARRIBADA BEAUMONT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE[1]

A. Misstatements of Fact and Omissions

In his petition Mr. Villegas states:

1. "The Honorable Stephen C. Robinson heard argument on July 31, August 15, August 31 and October 26, 2006. At the hearing on August 31, 2006, the district court denied Petitioner's motion for return of the child to Chile." (Petition, p. 2)

2. "In or around April 2004, Mr. Villegas and the Respondent separated . . . Mr. Villegas continued to maintain a relationship with [Name Of Minor Child Omitted] and to support her financially, including paying for [Name Of Minor Child Omitted]'s medical examinations." (Petition, p. 3)

3. On September 30, 2004, the Chilean Minors' Court of Quillota granted Mr. Villegas' petition for regulation of his right to a direct paternal relationship with [Name Of Minor Child Omitted] as authorized by Chilean law. Mr. Villegas continued to provide his daughter with emotional and monetary support, fulfilling his duty to maintain "a direct, permanent relationship" with his daughter as imposed on him by Section 229 of the Chilean Civil Code. (Petition, p. 3)

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[1] Page numbers preceded by "A" refers to the "Joint Appendix" and the "Supplemental Joint Appendix". Page numbers preceded by "SPA" refers to the "Special Appendix". Respondent Johana Ivette Arribada Beaumont is referred to as "Johana".

These statements are inaccurate, contain material omissions and are not supported by the evidence, nor the findings of the courts below.

1. Counsel appeared before Judge Robinson for conference (A-134) on July 31, 2006, with regard to Mr. Villegas' petition. At that time he heard counsel for Mr. Villegas' position with regard to the petition. (A-134-140)

Judge Robinson held another conference with counsel on August 15, 2006. (A-142-155) At that time Respondent's counsel submitted her response to the petition. (A-143; 284) He also objected to the document submitted by Petitioner, purporting to be a letter from the Chilean Authority, because the person who wrote the letter did not appear to be aware of the Chilean Court order dated July 13, 2005 which recited that Johanna "is legally found to have custody of the girl," and it was based upon an ex parte submission. (A-142-146; 217) At that time Mr. Villegas' counsel acknowledged that pursuant to the order dated July 13, 2005 Johana had legal custody of the child. (A-144; 152) Johana's counsel stated that although she had custody, she was not aware of the existence of the July 13, 2005 order, granting her custody, and that is why she applied for the order granting her permission to visit the United States. (A-153)

Judge Robinson held a hearing on August 31, 2006, at which neither party testified. (SPA 1-88) At

the conclusion of the hearing he denied the Petition for return of the child to Chile.

On October 26, 2006, Judge Robinson held a conference (SPA 88-101) with counsel for two purposes "one being that the plaintiff's wanted to file a motion for reconsideration, and, secondly, to talk about the situation with regard to setting up appropriate visitation understandings in this matter." Mr. Villegas' counsel stated that he wanted to file a motion for reconsideration to bring to the court's attention an (unpublished) article of Professor Bernardita Briones Maira. After confirming that this was the sole basis for the making of the motion Judge Robinson denied the motion because it added nothing new. (SPA 88-91)

2. In his Petition (A-8-14) Mr. Villegas alleged, inter alia, that he paid the tuition for the child's preschool, contributed monthly alimony, paid for the child's health insurance and visited her regularly. (Petition, p. 12; A-10) Mr. Villegas's attorney submitted an affidavit in support of his petition dated July 25, 2006, (A-9-101) which contained numerous exhibits in support of the petition including a letter obtained by her, written by an employee of the Chilean Central Authority (A-21; 41) to the National Center for Missing Children dated January 17, 2006.

The statements in Mr. Villegas' Petition that he "continued to maintain a relationship with [Name Of Minor Child Omitted] and to support her financially, including paying for [Name Of Minor Child

Omitted]'s medical examinations" and "continued to provide his daughter with emotional and monetary support" were denied by Johanna in her response to the petition.[2] In her Response to the Petition (A-284-286) she asserted, among other things, that Mr. Villegas did not have "rights of custody" within the meaning of Articles 3 and 5 of the Hague Convention. She asserted that she had custody of the child under a Chilean Court order of the court dated July 13, 2005 (A-217), and that this order was not mentioned in any of the papers Mr. Villegas submitted to the district court. She argued that since this order was not submitted to the Chilean Central Authority, its opinion, which was submitted to the court by Petitioner, was made without considering it. She further asserted that Mr. Villegas was not actually exercising rights of custody at the time of the removal. She asserted that he was visiting the child one day a week and did not pay any child support until she brought an action for child support on December 13, 2004. She indicated that the Court awarded her child support of 150 thousand pesos ($300.00) a month. However, because Mr. Villegas claimed to be indigent, his child support was lowered to 80 thousand pesos ($160.00) a month. Despite this downward modification, Mr. Villegas failed to make regular payments and paid a

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[2] On appeal Mr. Villegas relied upon a December 16, 2005 letter from a social worker, which had been attached to the petition (A-66), to support the argument that he was exercising rights of custody.

total of only 540,000.00 pesos, ($1080.00) toward the support of the child since the parents separated in December 2003. (A-284-286)

Mr. Villegas was not present in court for any of the proceedings. At the conclusion of the examination of Mr. Bianchi, Judge Robinson heard argument from Mr. Villegas' counsel and then ruled that Mr. Villegas was not actually exercising rights of custody. He stated: "I haven't seen a single piece of evidence that [Petitioner has] done any of the habitual parental exercises of discretion that would allow me to say he was exercising joint custody as the Convention defines it, much less as we define it." (SPA-77-78)[3]

3. In September 2004, Mr. Villegas' access to [Name Of Minor Child Omitted] was limited to eight hours a week after the Chilean Minors' Court of Quillota granted Mr. Villegas's visitation with his daughter every Sunday from 10:00 a.m. to 6:00 p.m. pursuant to, inter alia, Article 299 of the Civil Code, on September 30, 2004. (A-90)

---

[3] "Article 3. The removal or the retention of a child is to be considered wrongful where – (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

B. Additional Facts

On December 3, 2004, the Chilean Minors' Court of Quillota made an order which decreed: "The minor shall remain in the personal care of Ms. Johana Ivette Arribada Beaumont, her mother, as the most convenient protective measure." (A-223)

On February 13, 2005, Mr. Villegas brought a proceeding in the Chilean Minors' Court of Quillota for modification of visits, Rol 811-2005. The proceeding, "regarding tuicion" was transferred to the Eighth Minors' Court of Santiago, Rol No. 238-2005. (A-217)

On July 19, 2005, the Eighth Minors' Court of Santiago issued an order authorizing Johanna to travel to the United States with the Child for a period of three months. (A-51 to A-55) On November 14, 2005, Johana applied to the Eighth Minors' Court of Santiago for an extension of the authorization allowing the Child to remain in the United States, and, on January 6, 2006, the Chilean court denied Johana's request for an extension. (A-63)

On July 5, 2006, the Eighth Minors' Court of Santiago made a determination, pursuant to, inter alia, Articles 225 and 229 of the Chilean Civil Code, modifying visitation and denying legal fees. (A-116-118)

On July 25, 2006, Mr. Villegas filed a Petition for the Return of Child and an Order to Show Cause in the District Court. Mr. Villegas's attorney, submitted

an affidavit in support of his petition, dated July 25, 2006 (A-19-101) which contained numerous exhibits in support of the petition including a letter obtained by her, written by an employee of the Chilean Central Authority (A-21; A-41) to the National Center for Missing Children, dated January 17, 2006. This is the letter which Mr. Villegas asserts is "the authoritative statement on the Chilean law by the Chilean Central Authority."

On or about August 10, 2006, Johana's counsel wrote to the district court in support of a motion to dismiss the petition for lack of jurisdiction. At that time, she submitted to the court a copy of the Order of the Chilean court, dated July 13, 2005, which concludes "that it's not necessary to apply any measurement of protection because the minor [Name Of Minor Child Omitted] is not found to be in danger with her mother, Mrs. Johana Ivette Arribada Beaumont, who is legally found to have custody of the girl." (A-217) In the letter Johana's counsel argued, in support of the motion to dismiss, that the petitioner asserts (Petition, p. 12) that at the time of the respondent's wrongful retention of the child he was "actually exercising his rights of custody within the meaning of Articles 3 and 5 of the Convention." However, he does not state what these rights are or how he was exercising them. He also argued that the opinion letter from the Chilean Central Authority, dated January 17, 2006, to the National Center for Missing Children, did not mention the July 13, 2005 Chilean order, and it appeared that it was not made

aware of this order by the Petitioner, as it stated that "up to this date no judge of the Republic of Chile has granted custody of the child to her mother." The opinion letter from the Chilean Central Authority made the blanket statement that "In Chile the right of custody is shared by both parents . . . " but did not cite or attach copies of any of the laws of Chile or statutes that supported this conclusion. (A-41)

On August 18, 2006, the Chilean Court made a certification, in proceeding No. 238-2005 that " . . . the cause is still under process, but as of today's date it hasn't been allowed or permitted neither the custody nor the personal care of the minor [Name Of Minor Child Omitted] to her father." (A-221)

On August 28, 2006, the Secretary of the Judicial Authority of Chile certified that the "present trial of sole custody, Rol No. 238-2005, is still pending."

THE DISTRICT COURT HEARING

A hearing was held before Judge Robinson on August 31, 2006 to determine if Mr. Villegas had "rights of custody" under Chilean Law and to determine if he was "actually exercising" those rights at the time of the alleged wrongful removal.[4] (SPA-1-88)

[4] Article 3. The removal or the retention of a child is to be considered wrongful where – (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the

(Continued on following page)

Carlos Bianchi, an attorney admitted to practice in New York, and Chile, Spain and England, was called as a witness by Johana. (SPA-4) Mr. Bianchi attested to his familiarity with the Civil Code of Chile, especially Article 225[5] and Article 49.[6] (SPA-7)

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child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State. Hague Convention, Art. 3.

[5] Art. 225. If the parents live separately, the personal care of the children corresponds to the mother. Nevertheless, by public deed, or a statement executed before an officer of the Civil Registry, noted in the margin of the registration of the birth of the child within thirty days following its being granted, both parents, acting by mutual agreement, may determine that the personal care of one or more children corresponds to the father. This agreement may be revoked, with the same formalities being fulfilled. In any case, when the child's interests render this indispensable, whether due to mistreatment, lack of care or other special cause, the judge may grant its personal care to the other parent. But he may not entrust the personal care to a father or mother who has not contributed support of the child while it was under the care of the other parent, if he or she could have done so. So long as a notation relating to personal care is not canceled by a later one, no new agreement or determination may be alleged against third parties. (A-219)

[6] Should the custody of a child have not been granted by the judge to either parent or to a third party, the minor may not exit the country without the authorization of both parents, or from the one who had recognized him. Upon the custody being granted to either parent or to a third party, a child may only exit

(Continued on following page)

Although Judge Robinson ruled that he would not consider Mr. Bianchi as an expert in Chilean Family Law, he permitted him to testify about Chilean Law as a Chilean attorney, pursuant to Fed. R. Civ. P. 44.1. (SPA-30-31)

During Mr. Bianchi's testimony Judge Robinson took judicial notice (SPA-32) of Section 225 of the Chilean Civil Code. Mr. Bianchi testified that the first paragraph of Article 225 means that if the parents of a child are separated, then the custody of the children resides with the mother. (SPA-34-35) Judge Robinson pointed out to Mr. Bianchi that the translation of the statute said: "If the parents live separately, the personal care of children corresponds to the mother." Mr. Bianchi explained that he reached his conclusion because he was familiar with Section 225 of the Chilean Code and that under that section, in his view, the language "if the parents are separated the personal care of the children corresponds to the mother" means that she has custody. He indicated that "personal care" in Spanish, is the equivalent of "custody," because this is part of Title IX of Book I of the Chilean Civil Code, which is the title of the Chilean Civil Code that deals with custody rights. (SPA-33) Mr. Bianchi testified that the definition of custody in Article 224 of the Chilean Civil Code states that the

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the country with the authorization of the person to whom his/her custody had been granted. LAW N° 16,618 – MINORS LAW, TITLE III, JUVENILE COURT SYSTEM – ORGANIZATION AND POWERS, Article 49.

parents determine the personal care of the children. That is the chief provision in the Chilean law dealing with custody. There is no other title or chapter in the Chilean law which deals with matters of custody. (SPA-33)

During the hearing Judge Robinson referred to the July 13, 2005 order of the Chilean Court. (SPA-39; 49) He observed that it stated that the mother "is legally found to have custody of the girl." According to Mr. Bianchi, this provision recognized the legal status that was already in existence. (SPA-40) Mr. Bianchi testified that the Certification meant that Mr. Villegas did not have any custodial rights (SPA-37), and that section 229 of the Code dealt with rights of access, not rights of custody. (SPA-72)

Mr. Bianchi reviewed the letter of the employee of the Chilean Central Authority dated January 17, 2006 (SPA-53) and disagreed with its conclusion because it was not based on current information. It stated that the father had custody but there was no case or judicial authority cited to support this conclusion. He indicated that the person who prepared the report did not have any judicial authority in Chile, but appeared to be a pro bono employee of the state. (SPA-57) He also disagreed with its conclusion that under Chilean Law "rights of custody" included guardianship, patria potestas and the right to authorize the minor's right to exit the country, as well as its conclusion that Article 49 gives the father "rights of custody" by operation of law, where there has been no final custody determination. (SPA 53-69)

Judge Robinson tried to simplify the issue for Mr. Villegas' counsel, stating:

> Okay, let me try to short circuit where we are going here. Here's what I'm going to need to hear from the petitioner. I'm going to need to get some evidence that the Petitioner has been given custodial rights, not rights of access,[7] which is what that judicial order, in my view gave. Gave him right of access on Sunday nights. Is there something somewhere that gives him custodial rights? Because I'll tell you where I'm going with this. If not, I think what he had was access rights. And if what he had was access rights, I don't – I'm not in a position to order the child to be returned . . .

(SPA-73)

THE DECISION OF THE DISTRICT COURT

Mr. Villegas did not call any witnesses to testify after the conclusion of Mr. Bianchi's testimony. Judge

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[7] Article 5 distinguishes between "rights of custody" and "rights of access" as follows.

"Article 5. For the purposes of this Convention –

> (a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
>
> (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

Robinson then heard argument from Mr. Villegas' counsel (SPA 74-80), who argued that Mr. Villegas had default rights of custody under the operation of Chilean statutory law. He contended that Article 229 of the Chilean Code, which "imposes a duty" upon Mr. Villegas to maintain a direct and permanent relationship with the child, is a right of custody. (Petition, p. 22a; SPA-74-80)

Judge Robinson responded:

> This isn't custody in any sense of the word. That says you must maintain a relationship with your child. That doesn't give you the right to make any decisions for the child. (Petition, p. 22a) . . . The Convention defines rights of custody as rights relating to the care of the person of the child . . . We don't have that here. We could make a case for custody if there were other rights vested in the father in this case. I've stated some of them before. If we had any evidence that the father had the right to make determinations about the well being and the conduct of the child. We don't have any indication that there was any of that present here.
>
> The best the petitioner says is there is this order, which was Exhibit K, which gave access rights on Sundays . . . The mandate that he maintain a relationship with the child, in this court's opinion, does not give him custody rights.

(Petition, p. 23a; SPA-81-82)

Judge Robinson rejected counsel's argument, finding that this was not a right of custody in any sense of the word. "I have seen no order, no statement in statute or law from Chilean law, that this Petitioner is clearly in breach of other than access rights." He stated: "In fact, I haven't seen a single piece of evidence that he's done any of the habitual parental exercises of discretion that would allow me to say he was exercising joint custody as the convention defines it, much less as we define it." (SPA-78) He found that there was no evidence that the father had the right to make determinations about the well being and conduct of the child. (SPA-81)

As a consequence of Mr. Villegas' failure to demonstrate that he had rights of custody, and was actually exercising those rights, Judge Robinson dismissed the petition. (SPA-81-83)

Judge Robinson dismissed the petition and ordered that the child need not be returned to Chile. He found that Petitioner's rights under Chilean Law were "rights of access" and not "rights of custody" as those terms are used in the Hague Convention. He also found that Mr. Villegas was not exercising rights of custody.[8]

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[8] See also, Whallon v. Lynn, 230 F.3d 450, 453, 459 (1st Cir. 2000) (rights of custody exercised where respondent spent two weekends a month with child, lived near her, provided some financial support, drove her to school, bought her clothes, took her to the doctor, helped her with homework); Norden-Powers v. Beveridge, 125 F.Supp.2d 634, 640 (E.D.N.Y. 2000) (rights of custody exercised where parties participated in decision making

(Continued on following page)

In his petition Mr. Villegas states:

> "The district court did not analyze the authoritative statement of Chilean law by the Chilean Central Authority or provide any reason for rejecting its conclusions. Rather, the district court completely ignored the Chilean government's proffer regarding Chilean family law. See Appendix B. Indeed, the district court made no effort whatsoever to construe the relevant Chilean statutes, and looked solely at parental behavior in determining whether Mr. Villegas had rights of custody. See id."

(Petition, p. 8)

This statement is inaccurate. At the August 31, 2006 hearing Judge Robinson heard testimony from Mr. Bianchi and questioned him with regard to the relevant Chilean statutes, which it considered at the hearing, as well as the contents of the purported "authoritative statement of Chilean law by the Chilean Central Authority."

Mr. Villegas argues in his petition:

> "To confirm the reasonableness of the Central Authority's statement of Chilean law, Mr. Villegas presented to the district court an article (Appendix F) by Professor Bernardita

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regarding education and social welfare of children, looked after their medical needs and participated in their personal care. Mr. Villegas did not offer any evidence to establish by a preponderance of the evidence that he did any of these things.

> Briones Malta, the former Chief Attorney in the Office of International Procedure of the Chilean Central Authority (Appendix G), confirming that the Central Authority's statement of Chilean law is correct, i.e., that under Chilean law, the default rule for unmarried parents is joint custody. [FN6] However, the district court (and the panel majority) completely ignored this evidence as well. See Appendices A, C."

(Petition, p. 7)

He continues later on:

> "In this case, the reasonableness – indeed, the correctness – of the Chilean Central Authority's statement is confirmed by the Article (Appendix F) by Professor Bernardita Briones Maira, . . . which was submitted to the district court and was part of the record on appeal to the Second Circuit. (Petition, p. 18)

Mr. Villegas ignores the fact that this unpublished article (A-187) was not offered to the district court at or before the hearing it held on August 31, 2006, and its decision to dismiss the petition. The article was attached to a motion for reconsideration, which Mr. Villegas submitted and the district court denied, on October 26, 2006. (SPA-88-91) Although Mr. Villegas may have included this article in the record on appeal, it was not properly part of the record on appeal from the judgment dismissing the petition.

MOTION FOR RECONSIDERATION

On September 18, 2006, Mr. Villegas filed a Motion to Reconsider. On October 26, 2006, Judge Robinson denied his motion "to file a motion for reconsideration" because the unpublished article that the motion was based upon offered nothing new. On November 8, 2006, a judgment was entered which provides that it is "Ordered, Adjudged and Decreed: Plaintiff's motion to file a motion for consideration is denied." (SPA-102)

SECOND CIRCUIT MAJORITY OPINION

On July 18, 2008, the Second Circuit affirmed the judgment of the district court. See Appendix A. In its decision the court noted that the primary issue was whether under the Hague Convention Mr. Villegas had custody rights as opposed to rights of access. If Mr. Villegas had custody rights, United States courts would have jurisdiction to order the return of the child. However, if Mr. Villegas merely had access rights, then United States courts were without jurisdiction to order this remedy. It noted that the Hague Convention distinguishes between rights of custody and rights of access. It defines the latter as "the right to take a child for a limited period of time to a place other than the child's habitual residence." (Citing Hague Convention, art. 5, 51 Fed. Reg. at 10,498). Although remedies exist in the event that a child is removed in breach of access rights, recourse for such removal does not include an order of return to the

child's place of habitual residence. (Citing Hague Convention, art. 21, 51 Fed. Reg. at 10,500). It affirmed the holding of the district court that in such situations district courts may fashion a remedy ordering the custodial parent who has removed the child to allow and financially provide for periodic visits by the non-custodial parent.

The Second Circuit pointed out that neither the Hague Convention nor its implementing legislation defined "habitual residence." However, it had previously articulated the standard used to determine a child's habitual residence in Gitter v. Gitter, 396 F.3d 124, 134 (2d Cir. 2005) and applying these principals concluded that Chile was the habitual place of the child's residence.

Turning to the primary issue whether Mr. Villegas had rights of custody the court found that under Chilean law, when parents live separately, the responsibility for the personal care of their child rests with the mother. (Citing Code Civil Section 225 (Chile). However, the other parent still has a ne exeat right: the right to determine whether the child will leave the country. (Citing Minors Law 16,618 art. 49). Although Johana was granted permission by the Chilean court to leave the country with the child for three months, violation of the conditions of that order can be a violation of Mr. Villegas's ne exeat right. The Majority stated that in interpreting the Hague Convention, it has held that violating a ne exeat right is insufficient to qualify as a violation of custodial rights. (Citing Croll v. Croll, 229 F.3d at 138-140). In

Croll, it found that a ne exeat clause does not create rights of custody within the meaning of the Hague Convention. It explained that "custody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things." It reasoned that custody under the Hague Convention "references a bundle of rights . . . and is in some tension with the idea . . . that one can have custody by holding a single power such as the veto conferred by a ne exeat clause." In Croll, it said that although a ne exeat right limits a custodial parent's power to expatriate a child, it does not amount to a power to determine where the child will live. To hold otherwise would be "unworkable" because the Hague Convention assumes that "the remedy of return will deliver the child to a custodial parent who (by definition) will receive and care for the child. It does not contemplate return of a child to a parent whose sole right – to visit or veto – imposes no duty to give care."

The Majority agreed with the district court that Mr. Villegas did not establish the custody requirement by a preponderance of the evidence. The Majority noted that Mr. Villegas primarily relied on an affidavit from the Chilean Central Authority as support for his argument that he had custodial rights under Chilean law. Mr. Villegas maintained that the district court failed to afford the Chilean Authority's interpretation of Chilean law appropriate weight. The

Second Circuit found that the issue of whether the Central Authority's affidavit constituted an authoritative interpretation for the purposes of the Hague Convention was inconclusive for a number of reasons, including the fact that the Chilean Authority may not have had all information on this case available to it at the time that it made its assessment. It held that even if it was authoritative, the district court was not bound to follow it because while a foreign sovereign's views regarding its own laws merit some degree of deference they do not command that they be followed. (Citing Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 92 (2d Cir. 2002). It noted that reasons existed for the district court to refrain from giving the affidavit absolute deference. It also found it important that the Central Authority's conclusion that joint custody existed under Chilean law as a default rested almost exclusively on the ne exeat right, which it had previously held does not confer rights of custody. It noted that the district court looked to the rights Mr. Villegas claimed to possess in order to determine whether he had custody rights. Mr. Villegas also relied on the fact that he had visitation rights and that he paid for certain medical expenses. He pointed to Article 229 of the Chilean Civil Code which provides that a parent "who is not personally responsible for the care of a child will not be deprived of the right . . . to maintain a direct and regular relationship with the child." It found that this article addresses visitation rights only and not rights to care for the child under a custodial relationship. Johana had the authority to

make all the crucial decisions for the child. The only restrictions on Johana's decision-making power under Chilean law was that she had to allow Mr. Villegas his scheduled visitations and she could not take the child out of the country without either Mr. Villegas' permission or a court order. The Second Circuit held that the bundle of rights Mr. Villegas laid claim to did not create rights of custody under the Hague Convention and International Child Abduction Remedies Act; they cumulatively amounted merely to a right of access.

The Majority held that the removal of the child from Chile, although in violation of a lawful order from a Chilean court, did not breach rights of custody and was therefore not "wrongful" under the Hague Convention. The district court's order dismissing the petition for lack of jurisdiction and ordering periodic visitation of the child for Mr. Villegas was affirmed.

POINT I

THE PETITION SHOULD BE DENIED BECAUSE EVEN IF THIS COURT HELD THAT DEFERENCE MUST BE ACCORDED A FOREIGN SOVEREIGN'S VIEW OF ITS DOMESTIC LAW IN HAGUE CONVENTION CASES, THE LETTER PURPORTING TO BE THE CHILEAN GOVERNMENT'S VIEW OF ITS DOMESTIC LAW WAS NOT PROPERLY OBTAINED AND WAS UNRELIABLE.

Mr. Villegas asserts that: "The dispositive issue in this case is whether his rights vis-à-vis his daughter

are rights of custody or only a right of access under Article 5 of the Hague Convention." (Petition, p. 5) Mr. Villegas argues that rather than defer to the interpretation of Chilean statutes proffered by the Chilean government pursuant to a duly ratified treaty, the majority reasoned that Article 225's granting of "personal care" to the mother was equivalent to a grant of sole custody and that Article 49's recognition of shared custody merely provided a ne exeat right to Mr. Villegas. He argues that "in rejecting the Chilean government's statement of Chilean law, the majority stated that the district court had "[r]easons" for failing to defer to the Chilean Central Authority. However, the only "reason" identified by the majority is that "the Central Authority's conclusion that joint custody exists under Chilean law as a default rests almost exclusively on the ne exeat right." (Citing Croll v. Croll, 229 F.3d 133, 142 (2d Cir. 2000), cert. denied, 534 U.S. 949 (2001)). (Petition, p. 8-9)

The resolution of this issue is not dispositive in this case because the district court also found that Mr. Villegas was not exercising rights of custody at the time of the retention, and no evidence was offered at the hearing to establish that at the time of the removal he was "exercising" any rights of custody. See Hague Convention, Art. 15. The Second Circuit held that the Mr. Villegas did not have rights of custody because he did not demonstrate what specific rights he had, other than the ne exeat right, which it has held is not a right of custody under the Hague Convention.

(Citing Croll v. Croll, 229 F.3d 133, 142 (2d Cir. 2000), cert. denied, 534 U.S. 949 (2001)).

The Second Circuit found that the district court properly exercised its discretion in not relying on the letter from an employee of the Chilean Central Authority, because it was not convinced that it represented the Chilean government's view as to the legal status of unmarried parents under Chilean law. Mr. Villegas argues in his Petition that the district court failed to afford appropriate weight to the authoritative interpretation of Chilean law provided by the Chilean Central Authority. (Petition, p. 13) He points out that one of the duties of a Central Authority is to " . . . provide information of a general character as to the law of their State in connection with the application of the Convention citing Hague Convention, Art. 7(e) (A-25)." He argues that the Chilean Central Authority explained that the Petitioner and Respondent shared rights of custody under Chilean law, and that the District Court did not analyze the statement of the Chilean Central Authority, or even proffer an explanation as to why the court rejected that statement. (Petition, p. 7-8)

The Second Circuit found that the district court was not required to give weight to this letter based upon evidence that the document purporting to be authoritative was procured ex parte at Mr. Villegas's request, by his attorney, eight months before he filed his petition in the district court, did not contain any reference to case or statutory authority to support its conclusion, was not based on current facts or certified

as accurate, and was not sworn. Moreover, it was aware of the fact that the district court had not requested such an opinion pursuant to Article 15 of the Convention.[9]

The Convention and its implementing statute attempt to expedite determinations by relaxing the rules of evidence regarding the admission into evidence of the application or petition filed for the return of the child,[10] the authentication of documents offered into evidence,[11] and the requirements for the court

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[9] The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination. Hague Convention, Art. 15

[10] Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States. Hague Convention, Art. 30.

[11] "With respect to any application to the United States Central Authority, or any petition to a court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be

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taking judicial notice of the law in the State of the habitual residence of the child.[12]

However, the Convention does not eliminate the rules of evidence. See Fed. R. Evid. 1101(b). The Federal Rules of Evidence permit the court to take judicial notice of foreign law with great leeway. In determining foreign law, the district court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. Fed. R. Evid. 44.1.

In his petition Mr. Villegas states:

> Each country's Central Authority is to take "all appropriate measures . . . to provide information of a general character as to the law of their State in connection with the application of the Convention." Hague Convention, Art. 7(e). A Central Authority may provide a court in the abducted-to nation with "a decision or other determination that

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required in order for the application, petition, document, or information to be admissible in court." 42 U.S.C.A. § 11605.

[12] In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable. Hague Convention, Art. 14.

> the removal or retention was wrongful within the meaning of Article 3 of the Convention." Id.

(Petition, p. 6)

This argument is without merit. One of the tasks of the Central Authority, either directly or through any intermediary, is "to provide information of a general character as to the law of their State in connection with the application of the Convention. Hague Convention, Art 7(e). In addition, in order to assist the court in taking Judicial Notice of the Law of a contracting state the Hague Convention provides that judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention. Hague Convention, Art. 15.[13]

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[13] The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination. Hague Convention, Art. 15.

Thus, in addition to providing general information as to the law of the state, the duty of the Central Authority of the state of habitual residence is to assist applicants to obtain a decision or determination that the removal or retention was wrongful, where such a decision or determination may be obtained and when requested by the district court.

Here, no such request was made by the district court. Rather than assist the petitioner in obtaining a "decision or determination" that the removal or retention was wrongful within the meaning of Article 3 of the Convention, the Central Authority of the state of habitual residence made a determination, rather than provide a general statement of the law.

Our view of the role of the Central Authority is confirmed by the Department of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 FR 10494, which states that the role of the Central Authority is to assist. It states:

> Prior to ordering a child returned pursuant to Article 12, Article 15 permits the court to request the applicant to obtain from the authorities of the child's State of habitual residence a decision or other determination that the alleged removal or retention was wrongful within the meaning of Article 3. Article 15 does not specify which "authorities" may render such a determination. It therefore could include agencies of government (e.g., state attorneys general) and courts. Central Authorities shall assist applicants to obtain such a decision or determination. This

> request may only be made where such a decision or determination is obtainable in that State.

(See Department of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 FR 10508)

POINT II

THE COURT SHOULD NOT GRANT REVIEW TO RESOLVE A CIRCUIT SPLIT OVER WHETHER DEFERENCE TO A FOREIGN SOVEREIGN'S VIEW OF ITS DOMESTIC LAW IS PARTICULARLY APPROPRIATE IN HAGUE CONVENTION CASES BECAUSE THERE IS NO CIRCUIT SPLIT ON THIS QUESTION.

Mr. Villegas argues that this court should grant review to resolve a "circuit split" over whether deference to a foreign sovereign's view of its domestic law is particularly appropriate in Hague Convention cases. In this case the Second Circuit held that "a foreign sovereign's views regarding its own laws merit – although they do not command – some degree of deference." (Citing Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 92 (2d Cir. 2002). He cites two cases to demonstrate that there is a circuit split with the Second Circuit on this issue, neither of which are in point. (Petition, p. 11)

Mr. Villegas argues that in Navani v. Shahani, 496 F.3d 1121 (10th Cir. 2007), cert. denied, 128 S. Ct. 1232 (2008) which involved the abduction of an English child to the United States, the Tenth Circuit held that an English court's determination of English law was entitled to deference based on principles of comity. (Petition, p. 11) There was no such holding by the Tenth Circuit.

During the pendency of the appeal in Navani v. Shahani, 496 F.3d 1121 (10th Cir. 2007), cert. denied, 128 S. Ct. 1232 (2008), the English family court with jurisdiction over the child's custodial arrangements issued a new custody order concerning each parent's custodial rights. Navani argued in the Tenth Circuit that the new custody order mooted Shahani's appeal because it effectively striped Shahani of her custodial rights over the child. The Tenth Circuit agreed with Navani and dismissed the appeal because it failed to present a live case or controversy.

Mr. Villegas also argues that the Fourth Circuit came to the same conclusion in Fawcett v. McRoberts, 326 F.3d 491 (4th Cir. 2003), cert. denied, 540 U.S. 1068 (2003) but he does not discuss the circumstances of that case. (Petition, p. 12) He states in his brief:

> . . . see also Fawcett v. McRoberts, 326 F.3d 491, 500 (4th Cir. 2003), cert. denied, 540 U.S. 1068 (2003) ("Though we are obviously not bound by a decision from the House of Lords, judicial opinions of our sister signatories to the [Hague] Convention are entitled to considerable weight") (citing Air France v.

CONCLUSION

THE PETITION SHOULD BE DENIED.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

(5)

No. 08-775

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HUGO ALEJANDRO VILLEGAS DURAN,

Petitioner,

—v.—

JOHANA IVETTE ARRIBADA BEAUMONT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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Petitioner respectfully submits this Supplemental Brief in support of the Petition for Writ of Ceriorari. *See* Sup. Ct. R. 15.8.

PRELIMINARY STATEMENT

Respondent does not dispute that international child abduction is a serious problem which this Court can help to ameliorate by resolving the issues presented in the Petition. *See* Brief in Opposition to Petition for Writ of Certiorari. In fact, both the executive and legislative branches have recently spoken forcefully in support of strict compliance with the Hague Convention by states party. By granting the Petition and creating a uniform national standard for Hague Convention compliance, this Court will remove a potential obstacle to the political branches' efforts to enforce the Hague Convention. *See Republic of Austria v. Altmann*, 541 U.S. 677, 716, 124 S. Ct. 2240, 2264 (2004) ("[U]niformity in decision . . . is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.") (quoting H.R. Rep. No. 94-1487, at 13 (1976), U.S. Code Cong. & Admin. News 1976 at pp. 6611-12).

The Supreme Court should grant review.

ARGUMENT

I. BOTH THE EXECUTIVE AND LEGISLATIVE BRANCHES HAVE REITERATED THEIR STRONG SUPPORT FOR STRICT COMPLIANCE WITH THE HAGUE CONVENTION

A. The Sean Goldman Case

The case of Sean Goldman, an American child abducted by his mother to Brazil, has recently focused the attention of the United States government on the problem of international child abduction and the importance of proper respect for the Hague Convention. As in this case, Sean was taken by one parent for what was to be a temporary visit to a foreign state. The abducting parent refused to return the child, and the other parent brought an action under the Hague Convention. However, the Brazilian judiciary failed to properly apply the Hague Convention, and Sean's father has thus far been unsuccessful in obtaining his son's return to the United States.[1]

B. Efforts of the Executive Branch

Secretary of State Hillary Clinton has recently and publicly declared her strong support for strict compliance with the Hague Convention and has raised the issue with fellow Hague Convention party Brazil:

> "I did raise it at the highest levels of the Brazilian government. I've been working with several members of Congress. We're hoping that this case gets resolved," Clinton

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[1] *See generally* http://www.bringseanhome.org.

told NBC News correspondent Andrea Mitchell in an interview in Israel about the case of David Goldman and his son, Sean. The interview aired Wednesday on TODAY.

"Mr. Goldman has, under every known law of international adoption, followed the rules," Clinton said. "He's come in, he's made a claim—which is certainly a paramount claim—as the biological father, with every right to have custody of his son.

"A child belongs with his family," the secretary of state added. "There is no reason why David Goldman should not get his child back, and we're hoping that that will be resolved very soon. Obviously, if not, we will continue to raise it with the Brazilian government."

* * *

Clinton said that while Goldman's case is the one that is getting national publicity, there are many other similar cases involving American children. "These cases are across the world," she said.

Mitchell asked the secretary of state what she would say to Goldman.

"I would tell him he's been very brave, he has fought to have his son returned to him, his son is the most precious person in the world to him, and he has gone not just the extra mile, but mile after mile, back and forth, trying to make it clear that his son, Sean, deserves to be returned to him," Clinton said.

* * *

> [I]f there is no movement on the case, the U.S. government will be able to appeal directly to Brazilian President Lula da Silva when he pays a state visit to President Obama in two weeks.

Mike Celizic, "Clinton fights for boy abducted to Brazil," TODAY Show, March 4, 2009.[2] The State Department's efforts to enforce the Hague Convention were again highlighted in a press briefing one week after the Secretary's comments.

> ASSISTANT SECRETARY SHANNON: Well, in regard to the case of Sean Goldman, obviously, we've made it very clear that from our point of view, this is a case that falls within the purview of the Hague Convention and that Sean Goldman should be returned to his father. The Government of Brazil believes the same thing and has said so publicly. Currently, this case rests with the federal courts of Brazil.
>
> We are hopeful that the appropriate decision will be rendered. And this is an issue of great importance to us. *The President's aware of the issue. The Secretary raised the issue when she met with Foreign Minister Celso Amorim recently.* And the Secretary spoke with David Goldman last night and underscored how important this case is to the United States and how hopeful we are of a positive resolution as quickly as possible.
>
> QUESTION: Is the President going to raise the issue?

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[2] Available at http://today.msnbc.msn.com/id/29506677/.

> ASSISTANT SECRETARY SHANNON: Well, I can't say what the President's going to say or not. That's his decision. But obviously, he's aware of the issue. *He knows—he understands it's important—that it is important.* And as I said, the Secretary has made it very clear, both publicly and in our conversations with the Brazilians, that this is an issue that should be resolved quickly and positively in favor of Mr. Goldman under the Hague Convention.

Thomas A. Shannon, Jr., Assistant Secretary to Bureau of Western Hemisphere Affairs, "Preview of President Barack Obama's Meeting With Brazilian President Luiz Inacio Lula da Silva," On-The-Record Briefing, Washington, DC, March 13, 2009 (emphasis added).[3]

C. Action by the Legislative Branch

On March 11, 2009, the House of Representatives unanimously passed a resolution finding that "the judicial authority of Brazil has failed to comply with its obligations under article 11 of the Hague Convention." H. Res. 125.[4] The resolution "calls on the central authority of Brazil to immediately discharge all its duties under the Hague Convention [and] calls upon the Brazilian government to fulfill its obligation under international law to take all other appropriate measures to secure within its territory the implementation of the objects of the Hague Convention." *Id.* The resolution further declares that it

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[3] Available at http://www.state.gov/p/wha/rls/rm/2009/120337.htm.

[4] Available at http://thomas.loc.gov/cgi-bin/query/C?c111:./temp/~c111mVBXBv.

is the sense of the House of Representatives that the United States should "take any and all other appropriate measures to ensure that Hague Convention partners return abducted children to the United States in compliance with the Hague Convention's provisions." *Id.*

Similar legislation is currently pending before the Senate. *See* S. Res. 37.[5]

CONCLUSION

In recent weeks, the Secretary of State and the House of Representatives have publicly gone on record as supporting strict compliance with the Hague Convention by states party, including by the judiciary of a foreign nation. The Senate is likely to follow suit shortly. And an Assistant Secretary of State has stated that the President himself considers this issue important and may raise it personally with the President of Brazil.

The failure of the lower courts in this case to defer to the Chilean government's statement of Chilean law, as well as the United States' failure to adhere to a uniform standard for such deference threatens to undermine the substantial efforts of the executive and legislative branches in pressing for compliance with the Hague Convention by exposing the United States to the charge of hypocrisy, or at the very least, inconsistency. *See* Brief of the National Center for Missing and Exploited Children as *Amicus Curiae* in Support of Petitioner at 15 ("The decision below undermines the reciprocity essential to the operation of the Convention."). By

[5] Available at http://thomas.loc.gov/cgi-bin/query/C?c111:./temp/~c111BTpjux.

accepting this case for review, this Court will strengthen the hand of American diplomats working for the safe return of abducted American children.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 23, 2009

SUPPLEMENTAL BRIEF

No. 18-775

IN THE

Supreme Court of the United States

HUGO ALEJANDRO VILLEGAS DURAN,

Petitioner,

—v.—

JOHANA IVETTE ARRIBADA BEAUMONT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

On June 29, 2009, this Court issued a writ of certiorari in the case of *Abbott v. Abbott* (08-645) to decide the issue of whether a ne exeat clause confers a right of custody within the meaning of the Hague Convention. Petitioner respectfully submits this Second Supplemental Brief in support of the Petition for Writ of Certiorari to address the potential impact of this Court's forthcoming ruling in *Abbott* on the questions presented in the Petition. *See* Sup. Ct. R. 15.8.

If this Court determines that a ne exeat clause *does* confer a right of custody, then *Abbott* will control the outcome in this case, since it is uncontested that the abduction of the child by Respondent was in breach of Petitioner's ne exeat right. *See* Appendix A at 3a. However, as set forth below, if this Court holds that a ne exeat clause does *not* confer a right of custody under the Hague Convention, *Abbott* will not control the outcome of this case.

ARGUMENT

The facts of this case distinguish it from *Abbott* on two crucial grounds.

I. UNLIKE THE PARTIES IN *ABBOTT*, PETITIONER AND RESPONDENT WERE NEVER MARRIED AND THERE HAS BEEN NO JUDICIAL DETERMINATION OF CUSTODY

Abbott, like *Croll*, involved married, separated parents whose custodial rights had been thoroughly and finally adjudicated by the family

courts of their respective countries of habitual residence. *See Abbott v. Abbott*, 542 F.3d 1081, 1082 (5th Cir. 2008) (referencing order which "granted all custodial rights to the mother"); *Croll v. Croll*, 229 F.3d 133, 135 (2d Cir. 2000) ("[T]he only custody order applicable to this case . . . grants Mrs. Croll sole 'custody, care and control' of [their daughter] Christina and grants Mr. Croll a right of 'reasonable access.'"). Thus, if this Court affirms the Fifth Circuit in *Abbott*, it will hold that a parent with access rights coupled with a ne exeat right is not entitled to the remedy of return of the child to the country of habitual residence because the combination of a right of access and a ne exeat right does not amount to a right of custody. *See Abbott*, 542 F.3d at 1087; *Croll*, 229 F.3d at 135.

That is not the situation here. This case involves unmarried, separated parents whose custodial rights have never been adjudicated by the Chilean courts. (The Chilean custody litigation was aborted due to the Respondent's unlawful abduction of the child.) The parties' respective custodial rights, therefore, "depends on whether, under Chilean law, the default rule when the unmarried parents of a minor separate is [1] that they share joint custody or [2] that the mother has sole custody." Appendix A at 13a (Wesley, J. dissenting). Although the members of the Second Circuit panel disagreed as to the resolution of this issue, they were unanimous in identifying this as the issue presented by this case. *See id.* at 8a, 9a, 12a, 13a. A holding by this Court in *Abbott* that a right of access coupled with a ne exeat right does not amount to a custody right, therefore, would not control this case, despite the superficial coin-

cidence that both Mr. Abbott and Mr. Duran have a ne exeat right.[1]

II. UNLIKE IN *ABBOTT*, THE CHILEAN CENTRAL AUTHORITY HAS PROVIDED ITS VIEW OF THE PARTIES' RIGHTS UNDER CHILEAN LAW

There is no indication in the Fifth Circuit's *Abbott* opinion that the district court received a statement of Chilean law from the Chilean Central Authority. *See Abbott*, 542 F.3d 1081. Indeed, such a statement would have been completely superfluous in *Abbott*, since the respective custodial rights of the parties had been explicitly determined by orders of the Chilean family court. *See id.* at 1082.

By contrast, in this case, the Chilean Central Authority submitted a statement affirming that, under Chilean law, separated unmarried parents *both* retain rights of custody. *See* Appendix E at 36a. Therefore, this Court's ruling in *Abbott* will not impact the primary issue presented by the Petition, *i.e.*, whether the Second Circuit erred in affirming a district court opinion that completely ignored a foreign Central Authority's statement of

---

[1] A ne exeat provision "protects parental rights of access or custody alike." *Croll*, 229 F.3d at 142. Thus, while *Croll* "holds that a *ne exeat* clause cannot convert rights of access into rights of custody in the context of an explicit judicial determination of the respective rights of the parents . . . this does not foreclose Appellant's argument that a statutorily enshrined *ne exeat* clause may be evidence of a legal regime's recognition of shared 'rights of custody' in the absence of any judicial determination." Appendix A at 15a (Wesley, J. dissenting).

its domestic law provided pursuant to the Hague Convention.

CONCLUSION

If this Court holds in *Abbott* that a ne exeat clause confers a right of custody, then *Abbott* will control the outcome of this case. If, however, the Court holds that a ne exeat clause does *not* confer a right of custody, the Court should grant the Petition and resolve the questions presented therein.

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REPLY BRIEF

(4)

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Respondent.

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Petitioner respectfully submits this Reply Brief in support of the Petition for Writ of Certiorari. *See* Sup. Ct. R. 15.6.

PRELIMINARY STATEMENT

Respondent asks this Court to deny the Petition because she claims (1) that the Chilean Central Authority's statement was not properly obtained and is unreliable, and (2) that there is no split among the circuits. *See* Brief in Opposition to Petition for Writ of Certiorari ("Respondent Br.") at 21-31. Neither of these arguments has merit.

Rather, resolution of the issue presented in this case will end a split among the circuits over an important issue of treaty compliance, thereby facilitating the return of abducted children, and will likely spare numerous children and families the trauma of abduction by enhancing the deterrent power of the Hague Convention.[1]

The Supreme Court should grant review.

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[1] *See* Brief of the National Center for Missing and Exploited Children as Amicus Curiae in Support of Petitioner ("NCMEC Br.") at 3 ("The resolution of the Question Presented will have a profound effect on the efficacy and practical operation of the Hague Convention.").

ARGUMENT

I. THE STATEMENT OF THE CHILEAN CENTRAL AUTHORITY IS AUTHORITATIVE, WAS OBTAINED PROPERLY, AND CORRECTLY STATES THE LAW OF CHILE

A. The Statement of the Chilean Central Authority was Properly Provided Pursuant the Hague Convention

The Hague Convention requires that an application for a child's return contain "a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State." Convention, art. 8(f). Mr. Villegas properly obtained such a certificate from the Chilean Central Authority. *See* Appendix E at 32a-46a.

Respondent incorrectly contends that the

> Second Circuit found that the district court was not required to give weight to [the statement of the Chilean Central Authority because it] was procured ex parte at Mr. Villegas's request, by his attorney, eight months before he filed his petition in the district court, did not contain any reference to case or statutory authority to support its conclusion, was not based on current facts or certified as accurate, and was not sworn. Moreover [the Second Circuit] was aware of the fact that the district court had not requested such an opinion pursuant to Article 15 of the [Hague] Convention.

Respondent Br. at 23-24. In fact, the Second Circuit relied on none of these reasons in justifying its rejection of the Chilean Central Authority's legal conclusion. *See* Appendix A at 4a-12a.

The Hague Convention specifically provides for petitioners to seek such reports (presumably ex parte, since the abducting parent is unlikely to cooperate) from their respective Central Authorities, and does not require that the document be sworn, or that it cite caselaw.[2] Furthermore, statute mandates that, "no authentication of [a Hague Convention] application, petition, document, or information shall be required in order for the application, petition, document or information to be admissible in court." International Child Abduction Remedies Act, 42 U.S.C. § 11605.

The only reason mentioned by the Second Circuit to justify its holding that "even if [the statement of the Chilean Central Authority] is authoritative, the district court was not bound to follow it" is that "the Chilean Central Authority's conclusion that joint custody exists under Chilean law as a default rests almost exclusively on the *ne exeat* right [and we] have already stated that as we interpret the Hague Convention, this veto power does not confer rights of custody." Appendix A at 10a. Thus, the Second Circuit held that a U.S. court need not defer to a foreign sovereign's own conclusion that a parent possesses rights of custody under that sovereign's

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[2] *See* Hague Convention, art. 15. In this case, there was no need for the district court to make a request from the Central Authority, since it already had the Chilean government's statement. The district court was free to seek clarification from the Chilean Central Authority but chose not to do so. *See* Appendix A at 19a (Wesley, J., dissenting).

domestic law, where a U.S. court has held that one of the rights on which the foreign sovereign bases its conclusion is not a right of custody when standing alone. This contravenes the spirit of the Hague Convention which depends on deference to the custody determinations of the child's country of habitual residence, and ignores the Central Authority's finding that unmarried parents share a *bundle* of rights under Chilean law: "[B]oth parents have the guard and custody of their daughter . . . since the decisions of major importance must be adopted by both parents, since [ ] both parents [have responsibility for] the well-being of their daughter. Therefore, none of them can unilaterally take decisions [with] respect [to] their daughter." Appendix E at 37a.

B. The Second Circuit was Free to Consider the Briones Article

Respondent contends that the Briones Article (Appendix F) was not properly before the Second Circuit. *See* Respondent Br. at 16. This argument lacks merit.

The Second Circuit reviewed the district court's conclusions of law de novo. *See* Appendix A at 4a. "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. Furthermore, the Hague Convention provides that "in ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial . . . authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally rec-

ognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable." Convention, art. 14. Under these standards, the Second Circuit had broad discretion to consider the Briones Article.

C. The District Court Found that the Order of July 13, 2005, did not Award Sole Custody to the Respondent

Respondent recycles the argument (explicitly rejected by the district court in a finding undisturbed by the Second Circuit) that the Chilean court order dated July 13, 2005 (the "Order") awarded her sole custody of Valentina.[3] *See* Respondent Br. at 2, 4, 7, 11.[4] In the district court, Respondent attempted to challenge the Central Authority's statement by arguing that the Central Authority was unaware of the Order when it concluded that both parents have rights of custody. The district court correctly determined, however, that the Order was not a custody order at all, but rather an interim order denying a request for protective measures.

> THE COURT: Okay. Here's the bottom line. I'm going to find that this is not an order of custody. It is not. This was not brought up in the context of a custody dispute. . . . This

[3] The child's full name, Valentina Almendra Villegas Arribada, was published in the federal register. *See* Appendix A at 2a.

[4] Respondent informs this Court that the district court noted that the Order states "that the mother 'is legally found to have custody of the girl' " but does not disclose to this Court that the district court found that the Order was not a custody order at all, and was of no relevance to the legal issue at hand. Respondent Br. at 11; *compare* Appendix I.

> was not a situation where they went in the court and said please define custody rights.

Appendix I at 5b.[5] Therefore, the Order is irrelevant to any issue which would be properly before the Court. *See* Sup. Ct. Rule 15.2.[6]

D. Carlos Bianchi's Testimony is Irrelevant

Respondent again relies on the lay testimony of Carlos Bianchi. *See* Respondent Br. at 9-11. Mr. Bianchi, whom the district court found was not an expert in Chilean family law, was paid by the Respondent for his testimony. *See* Appendices J, K. Thus, in construing Chilean law, the district court preferred the views of a paid layman over the authoritative statement of the Chilean government

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[5] The Order does not state that Respondent has sole custody of the child, or that Mr. Villegas does not have rights of custody. The Order does recite that the Respondent has custody of the child, but this was never disputed by Mr. Villegas. *See* Appendix I at 2b ("MR. BROOK: It is undisputed both that the respondent has custody rights and that she has physical custody of the child. We're not disputing that. Rather, the issue . . . is whether the petitioner also has custody rights."). Similarly, the August 18, 2006 certification (Respondent Br. at 8) merely recognizes that there has been no judicial award of custody to Mr. Villegas, a fact which is also not in dispute. Thus, all three members of the Second Circuit panel determined that the dispositive issue in the case is what are the respective rights of unmarried Chilean parents *by operation of law*, i.e., when there has been no judicial award of custody. *See* Appendix A at 8a, 13a.

[6] None of the other alleged "Misstatements of Facts and Omissions" (which Petitioner denies are misstatements or omissions) bears any relevance to any issue which would be before the Court if certiorari were granted. Furthermore, none of the allegations which bear on the merits of the Chilean custody dispute (e.g., child support payments) are properly before this

agency responsible, pursuant to a duly ratified treaty, for providing the court with information about Chile's domestic law.

E. The Rights of Custody Issue is Dispositive

Respondent contends that resolution of whether Mr. Villegas had custody rights is not dispositive because "the district court also found that Mr. Villegas was not exercising rights of custody at the time of retention." Respondent Br. at 22. This is incorrect.

Because it held that Mr. Villegas did not possess rights of custody, the district court did not reach the issue of whether Mr. Villegas was actually exercising any such rights. *Compare Gallivan v. Springfield Post Rd. Corp.*, 110 F.3d 848, 850 (1st Cir. 1997) (court did not reach secondary claim which depended on primary claim which court had rejected).

In any event, virtually every federal court which has considered the issue has found that a parent with de jure custody rights will be found to have been actually exercising those rights short of acts constituting unequivocal abandonment of the child. *See, e.g., Carrascosa v. McGuire*, 520 F.3d 249, 260 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 491 (2008); *Bader v. Kramer*, 484 F.3d 666, 670 (4th Cir. 2007); *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 344-45 (5th Cir. 2004); *Navani v. Shahani*, 496 F.3d 1121, 1128 (10th Cir. 2007); *Friedrich v. Friedrich*, 78 F.3d 1060, 1065-66 (6th Cir. 1996).

Court. *See Diorinou v. Mezitis*, 237 F.3d 133, 140 (2d Cir. 2001) (Hague courts have jurisdiction to determine the wrongfulness of the removal, not the merits of the underlying custody dispute).

II. THE DECISION OF THE SECOND CIRCUIT CREATES A CIRCUIT SPLIT

The holding of the Second Circuit in this case is that a statement of foreign law provided by a Hague Convention Central Authority, even if authoritative, need not be followed by a district court. *See* Appendix A at 10a.[7] This holding contradicts "precedent[s] of sister circuits suggesting that such deference is particularly favored in the context of determining custody rights under the Hague Convention." Appendix A at 18a (Wesley, J., dissenting); *compare Navani v. Shahani*, 496 F.3d 1121, 1128 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 1232 (2008); *Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003), *cert. denied*, 540 U.S. 1068 (2003).

Respondent argues that there is no circuit split because (1) the Tenth Circuit did not hold that an English court's determination of English law was entitled to deference, and (2) while the Fourth Circuit held that judicial opinions of sister Hague Convention signatories are entitled to considerable weight, it did not address the issue of whether a foreign sovereign's certificate from its Central Authority is entitled to the same deference. *See* Respondent Br. at 29-30. The first of these arguments is simply incorrect and the second one is entirely without merit.

---

[7] Respondent misstates the holding of this case as "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." Respondent Br. at 28. That language appears in the Second Circuit's opinion only as a quotation from its previous ruling in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 2256 (2003). *See* Appendix A at 10a.

A. The Decision of the Second Circuit Creates a Split with the Tenth Circuit

In *Navani*, petitioner brought suit under the Hague Convention alleging that the retention of his son in the United States by Respondent was in breach of his rights of custody under English law. The district court granted the petition for return of the child, finding that both parents had rights of custody and that therefore the removal was in breach of petitioner's rights of custody and, thus, wrongful under the Convention. Respondent appealed to the Tenth Circuit. While the appeal was pending, an English court entered an order awarding sole custody of the child to petitioner. Petitioner argued that the adjudication of parental rights by the English court mooted respondent's appeal because, under English law, she no longer had rights of custody.

Respondent argued (1) that the English court was mistaken about the content of English law and (2) that the ex parte proceeding in which it issued the order was unfair. *See Navani*, 496 F.3d at 1126-27. The court rejected this argument, holding that the English sovereign's determination of rights of custody should be given effect by American courts, based on "general principles of comity . . . and more fundamentally, factors unique to the Hague Convention." *Id.* at 1128. "As this court has no jurisdiction to [adjudicate] the parties' custody rights over Jivan, we must yield to the English family court's decision forbidding Shahani from removing Jivan to the United States. As a result, we can grant no effectual relief to Shanani." *Id.* at 1130; *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996) (holding of a case includes the final disposition as well as the preced-

ing determinations which are necessary to that result). Thus, the finding that deference was due to the English sovereign's determination of the parties' respective rights under English law was part of the holding of the Tenth Circuit, and conflicts with the holding of the Second Circuit in this case.

B. The Decision of the Second Circuit Creates a Split with the Fourth Circuit

Respondent argues that the Fourth Circuit held in *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003) "that judicial opinions of sister [Hague Convention] signatories are entitled to considerable weight." Respondent Br. at 30. She contends that the Fourth Circuit's holding that deference is due to a foreign sovereign when it expresses itself through a judicial ruling does not conflict with the Second Circuit's holding that a foreign sovereign's statement need not be deferred to when is made by an administrative agency. *See id.* This argument lacks merit.

In *Fawcett*, the Fourth Circuit stated that although "we are obviously not bound by a decision from the House of Lords, judicial opinions of our sister signatories to the Convention are entitled to considerable weight." 326 F.3d at 500. At issue in *Fawcett* was whether an institution, such as a court, can possess rights of custody within the meaning of the Hague Convention. *See id.* The Fourth Circuit accepted the holding of the House of Lords that, under the law of the United Kingdom, a court can have rights of custody. *See id.*

Although both the *Navani* and *Fawcett* courts deferred to judicial orders of foreign sovereigns, there is no reason why a statement of law issued by an administrative agency such as a Central Author-

ity should be entitled to less respect. Rights of custody may arise "by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." Convention, art. 3(b). In cases such as this one, where there has been no judicial award of custody and no agreement between the parties, parental rights arise by operation of law. In such cases, the likely form in which a foreign sovereign's views would be expressed is in a statement from its Central Authority. *See* Convention, arts. 8(f), 15; *see also* NCMEC Br. at 11-14. There is nothing in the Convention which would suggest that a different level of deference is due depending on the source of rights of custody in a particular case. *Compare In re Oil Spill by the Amoco Cadiz off the Coast of France March 16, 1978*, 954 F.2d 1279, 1312 (7th Cir. 1992) (deferring to administrative agency of a foreign sovereign).

Respondent further contends that "there is no substantive difference between the Second Circuit's view that such opinions are entitled to 'deference' and the Fourth Circuit's view that such opinions are entitled to 'considerable weight.' " Respondent Br. at 31. In *Fawcett*, the Fourth Circuit adhered to a foreign sovereign's determination that an institution had rights of custody under that sovereign's domestic law. *See Fawcett*, 326 F.3d at 500. In this case, while reciting boilerplate that a foreign sovereign's view is entitled to "deference," the Second Circuit nevertheless affirmed a district court decision that completely ignored a foreign sovereign's statement of its domestic law, and issued an opinion that ignored, with one exception (the *ne exeat* right), the bundle of rights which the foreign sovereign stated

were possessed by both unmarried parents. *See* Appendix A at 10a-11a.

The Second Circuit's decision in this case creates a split with the Fourth and Tenth Circuits, which this Court should resolve by granting the Petition.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 23, 2009

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

06 Civ. 5608 (SCR)
White Plains, N.Y.
August 15, 2006
3:50 p.m.

HUGO ALEJANDRO VILLEGAS DURAN,

Petitioner

—v.—

JOHANA IVETTE ARRIBADA BEAUMONT,

Respondent.

Before:

THE HONORABLE STEPHEN C. ROBINSON,

District Judge

APPEARANCES

ARNOLD & PORTER, LLP
Attorneys for Petitioner
JOSHUA ALEXANDER BROOK, ESQ.
Also Present: RODERICK L. ARZ

ROBERT D. ARENSTEIN, ESQ.
Attorney for Respondent
Also Present: SANDRA NUNEZ AND MS. BEAUMONT

MR. BROOK: It is undisputed both that the respondent has custody rights and that she has physical custody of the child. We're not disputing that. Rather, the issue before your Honor is whether the petitioner has custody rights.

If you look at the—I call the Court's attention to Exhibit D, the letter from the Chilean Central Authority, which states that the right of custody alluded to by the Hague Convention in our, meaning Chilean legislation, includes the following rights: The custody, the personal care of the minor, the guards, the patria potestas and the right to authorize the minor's exit to the country which are regulated in different articles contained in different laws.

The central authority is referring to the bundle of rights of—the bundle of rights called custody rights in which in this case are shared by both the petitioner and the respondent.

Furthermore, if the July 13th order—the July 13th order cannot be read to have the legal effect that the respondent is claiming for it, because as recently as August 2nd, the Chilean court, which continues to have jurisdiction over the custody proceedings, certified that the discovery deadline in this case is expired and the custody proceedings are still pending. And I call the Court's attention to Exhibit R in the Supplemental affidavit of Ms. LaSolla. There's been no final award of—

THE COURT: Hold on. I don't have an R. I go to P.

MR. BROOK: It's in the supplemental affidavit, your Honor. Would you like—we can provide a copy.

THE COURT: Yeah. I don't have that.

And what is it you think I should make of this document?

MR. BROOK: Well, you should take it as a certification from the Chilean court that there's an ongoing custody proceeding in Chile, which if the July 13th order awarded sole custody to the respondent, that would be then end of it. There wouldn't be a pending proceeding. The whole purpose of the Hague Convention is to prevent people like the respondent from short-circuiting ongoing custody proceedings by abducting children to third countries.

THE COURT: Hold on. Okay. I didn't take that to say she had sole custody.

MR. BROOK: Okay.

* * *

MR. ARENSTEIN: And as far as that report is concerned, I would challenge it and state to your Honor that in it, it does not contain any reference to the custody order that—the July 13th custody order. And there are reasons that I don't understand why they were not included. And also, my client will explain why everything occurred subsequent to that with regard to this custody order, because this order came down, and originally she did not have knowledge of it. The lawyers had knowledge of it. Apparently, she didn't know it existed.

THE COURT: You're referring to this document when you keep saying "custody order"?

MR. ARENSTEIN: Yes.

THE COURT: This isn't a custody order.

MR. ARENSTEIN: The order of this court which says legally found to have custody of the child, of the girl. This order of July 13th, 2005 is a custody

order, your Honor. It is a custody order, and I don't know if you have the English translation there. I have the court—it's a court order. It's an order of the court, and it's right here. It's the same court that they have all their access orders that they put in there that we'll get into when I have—

THE COURT: Well, let me put it to you this way: It is not—

MR. ARENSTEIN: Are you looking at the custody order or the support order? This order here, your Honor.

THE COURT: Yeah. That's in Spanish. I'm looking at the translation.

MR. ARENSTEIN: And the one behind it?

THE COURT: This?

MR. ARENSTEIN: Yes, that. That is from the Court itself, the Spanish one, the original one, and that order is still in existence. As you will find out, there were two different proceedings—

THE COURT: I don't read this document in the way that—the context of this document is clearly that the petitioner has brought an action in this proceeding for an order of protection, and the court is saying—I would have to paraphrase it—quote, because the minor is not found to be in danger with her mother who was legally found to have custody of the girl, it's not granting the order of protection. This was not a proceeding by which custody was being granted. They're saying she has custody, which they—she has custody rights, which they agree to. We all agree with that.

* * *

THE COURT: A party can have custody. The other party can still have custody in the way that the Hague Convention defines it.

MR. ARENSTEIN: Except in the Second Circuit the Croll case is quite clear—I tried it, and I was on the other side of the case, because I argued exactly what your Honor is arguing to me, and the Second Circuit ruled that access rights do not equate to custody. There is an order of custody here. As far as I'm concerned, this is an order of custody, and every order that they submit—

THE COURT: Okay. Here's the bottom line. I'm going to find that this is not an order of custody. It is not. This was not brought up in the context of a custody dispute. This was an order issued in the context of the petitioner asking for an order of protection. This was not a situation where they went in the court and said please define custody rights. It's what it clearly says on your translation. This is where the parties went into court where the petitioner was asking for an order of protection, and the court says I'm not issuing an order of protection, because I find the child is not in danger and that there is custody on the part of the plaintiff.

MR. ARENSTEIN: Well, what does the word "legally found to have custody mean," your Honor? Legally found, not physical custody, legally found to have custody—

THE COURT: Sit down. We're not going to argue about it. I don't mean to stop you in that way. This was not a document that was even raised in that context. There are custody proceedings. Then there

are proceedings that people bring because they want an order of protection because they think the child is in danger.

The custody proceeding is the one where the Court delineates the rights of the parties and says custody here, not custody here, these are rights here, these rights there.

MR. ARENSTEIN: And the order—

THE COURT: Let me finish. This document was issued in the context of a proceeding where the petitioner was asking for a protective order, and the court says I'm not giving it, because I don't think the child was in danger and because it's legally found that she had custody.

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

06 Civ. 5608 (SCR)
White Plains, N.Y.
August 31, 2006
10:30 a.m.

HUGO ALEJANDRO VILLEGAS DURAN,

Petitioner

—v.—

JOHANA IVETTE ARRIBADA BEAUMONT,

Respondent.

Before:

THE HONORABLE STEPHEN C. ROBINSON,

District Judge

APPEARANCES

ARNOLD & PORTER, LLP
Attorneys for Petitioner
JOSHUA ALEXANDER BROOK, ESQ.
Also Present: RODERICK L. ARZ

ROBERT D. ARENSTEIN, ESQ.
Attorney for Respondent
Also Present: SANDRA NUNEZ AND MS. BEAUMONT

THE COURT: Well, I don't see how I can declare Mr. Bianchi an expert. The way in which that's usually done in court is that we have someone who has presented a speech, a particular skill in assessing the particular issue at hand. Here, we have a person who has admitted the last time they formally studied the issue was 23 years ago. He says he has not taken another course on the issue since then. He has never written on the issue. He has never participated in a seminar on the issue as an audience participant. He's also never participated as a panelist, as a speaker of any kind, as a presenter of any kind on this issue.

I know that it is his view that anyone would be an expert, but that's certainly not the way we work here. We would never say, for instance, any lawyer who took a patent course in law school and says they have read materials on patent law over the years would be qualified as an expert in patent law. We would say you got to have worked in patent law. You got to have done something that shows you're more than the average lawyer, but that you have done something. You've written articles. You're a lecturer. You're asked to speak on the issue, meaning that other people look at you as someone who knows about it because they bring you in to speak at seminars, be they here or in Chile. But I have difficulty qualifying someone on this basis as an expert because, under his own account, that would make every lawyer an expert on the law when they have no specialty in the law, when they haven't done anything that demonstrates to this court that they have particularized knowledge or experience.

I don't know that Mr. Bianchi isn't an excellent lawyer, so please don't take anything I say to be a

criticism of that. His curriculum vitae indicates that he has been a partner at law firms, and good law firms, here in the States. But at least in the context of this matter, I would have liked to have seen something in it that even at least mentioned the area that he's here to be qualified as an expert about.

I have reviewed the curriculum vitae and literally have not seen the words "family law" appear in any of its four pages. And certainly when he talks about what is the nature of his practice, he doesn't even mention it. When he talks about his experience as an arbitrator or mediator, or participation in that, he doesn't mention it.

Let me ask you one last question. You say in your page 4 you have given expert evidence on several occasions in court proceedings on the law of Chile. We have asked you have you been qualified as an expert in family law. I think the answer to that has been no. What area of Chilean law have you been qualified to give expert evidence in court proceedings on?

THE WITNESS: As I testified before, on two occasions, it related to commercial or corporate law, and one occasion it related to family law. That last occasion was a pension case, or Social security case, in New Jersey, and I had to give an affidavit on family relationships under Chilean law.

THE COURT: And that case, what court was that case in?

THE WITNESS: I believe it was before the Social Security Administration, the Federal Social Security Administration based in New Jersey.

THE COURT: So it wasn't a court, but it was an administrative proceeding before the Social Security Administration.

THE WITNESS: That's my recollection.

THE COURT: All right. So it's not a court proceeding. It was an administrative proceeding.

THE WITNESS: That's my recollection.

THE COURT: Okay.

And in that proceeding, you were determined to have been an expert?

THE WITNESS: There was no formal determination. I was asked to file an affidavit on behalf of one of the parties, and I did so.

THE COURT: Okay.

All right. I am not going to find that I have the basis on which to declare Mr. Bianchi as an expert in family law, which is the issue before us.

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CASE NO. 7:06-CV-5608
New York, New York
August 30, 2006

HUGO ALEJANDRO VILLEGAS DURAN,

Petitioner

—v.—

JOHANA IVETTE ARRIBADA BEAUMONT,

Respondent.

Deposition of CARLOS J. BIANCHI held at the offices of Arnold & Porter, LLP, 399 Park Avenue, New York, New York, pursuant to Notice, before Yaffa Kaplan, a Notary Public of the State of New York.

APPEARANCES:

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BY: JOSHUA A. BROOK, ESQ.

—and—

RODERICK ARZ, ESQ.
LAW OFFICES OF ROBERT D. ARENSTEIN
Attorneys for Respondent
295 Madison Avenue
New York, New York 10017

BY: ROBERT D. ARENSTEIN, ESQ.

Q. Thank you.

And how did you come to be involved in this matter?

A. I was called by Mr. Arenstein's office.

Q. And he retained you as an expert?

A. Correct.

Q. He is paying you for your services?

A. Correct.

Q. And he—

A. May be I should make a correction to that. His client is paying me for the services.

AMICUS CURIAE BRIEF

123 MOTION FILED
MAR 13 2009

(2)

No. 08-775

IN THE

Supreme Court of the United States

HUGO ALEJANDRO VILLEGAS DURAN,
Petitioner,

v.

JOHANA IVETTE ARRIBADA BEAUMONT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 08-775

HUGO ALEJANDRO VILLEGAS DURAN,
Petitioner,

v.

JOHANA IVETTE ARRIBADA BEAUMONT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, The National Center for Missing and Exploited Children ("NCMEC") respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the Petitioner. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondent was timely requested but refused.

NCMEC is a non-profit organization established to prevent child abductions, help find missing children, and assist victims of child abduction, their families, and the professionals who serve them. NCMEC provides training and support to law enforcement agen-

cies in the prevention, investigation, and prosecution of cases involving missing and exploited children. NCMEC tracks and reports domestic and international child abductions that it handles and frequently works with international organizations and formally-designated Central Authorities of foreign countries to ensure the prompt and safe return of children abducted from the United States. Therefore, NCMEC has a strong interest in the correct and uniform interpretation and application of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*[1] and in ensuring that authoritative statements made by foreign sovereigns regarding the proper interpretation of their domestic custody laws are respected.

NCMEC submits that the United States Court of Appeals for the Second Circuit erred by not according deference to a foreign sovereign's statement of the meaning of its own domestic custody law, and that this error will have a negative impact on the resolution of a substantial number of international child abduction cases.

Respectfully submitted,

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---

[1] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 ("Hague Convention" or "Convention").

QUESTION PRESENTED

When determining whether a petitioner has "rights of custody" under the Hague Convention, should a United States court defer to a foreign sovereign's authoritative statement of its own domestic laws to determine the petitioner's rights under that sovereign's laws?

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IN THE

Supreme Court of the United States

No. 08-775

HUGO ALEJANDRO VILLEGAS DURAN,
Petitioner,

v.

JOHANA IVETTE ARRIBADA BEAUMONT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The National Center for Missing and Exploited Children ("NCMEC") was established in 1984 as a private, non-profit 26 U.S.C. § 501(c)(3) organization

[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. U.S. Sup. Ct. R. 37.6 (2007). No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

to aid in the prevention of child abductions, to assist in finding missing children, and to help victims of child abductions. NCMEC is assisted by a grant from the United States Department of Justice[2] and has been designated by Congress as "the official national resource center and information clearinghouse for missing and exploited children."[3] NCMEC operates a national network that links state missing children clearinghouses with federal law enforcement agencies and international organizations, including the Scotland Yard, the Royal Canadian Mounted Police, INTERPOL,[4] and others. This network enables NCMEC to transmit images and information regarding missing and exploited children to law enforcement around the world.[5] Congress has mandated that NCMEC annually report to the Department of Justice's Office of Juvenile Justice and Delinquency Prevention regarding the number of missing children and child abduction cases it handles.[6]

NCMEC frequently works with entities established by foreign nations, including the formally-designated Central Authorities of Hague Convention contracting states.[7] NCMEC's work under the Hague Convention includes "outgoing cases," those in which a parent

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[2] 42 U.S.C. § 5773(b) (2008).

[3] *Id.* at § 5773(b)(1)(B).

[4] INTERPOL stands for the International Criminal Police Organization. It facilitates cross-border police cooperation. *See* http://www.interpol.int/public/icpo/default.asp.

[5] 42 U.S.C. § 5771(9)(C) (2008).

[6] 42 U.S.C. § 5773(b)(1) (2008).

[7] *See* Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 ("Hague Convention" or "Convention").

abducts a child from the United States to another country, as well as "incoming cases," those in which an abducted child is brought into the United States from a foreign country.[8] In outgoing cases, NCMEC assists the left-behind parent with assembling an application for relief under the Hague Convention, finding legal counsel, and obtaining clarification of foreign custody laws from foreign authorities. Through its long involvement in processing Hague Convention cases, NCMEC has established relationships with Central Authorities and other agencies in many of the contracting states. These relationships are essential to NCMEC's ongoing work in ensuring the prompt return of children abducted from the United States to foreign countries.

The resolution of the Question Presented will have a profound effect on the efficacy and practical operation of the Hague Convention. NCMEC has a strong interest in ensuring that statements of custody law made by foreign sovereigns are respected and that children who are "wrongfully removed" or "wrongfully retained" within the meaning of the Hague Convention are returned to their countries of habitual residence.

STATEMENT OF THE CASE

NCMEC submits that the writ should be granted for three reasons. First, there are thousands of cases of cross-border child abduction, and the resolution

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[8] Between 1995 and 2008, NCMEC processed all incoming cases on behalf of the United States Department of State via a cooperative agreement between the United States Department of State and the United States Department of Justice. In April 2008 the United States Department of State, Office of Children's Issues, assumed primary responsibility over all incoming Hague Convention abduction cases.

of the Question Presented will therefore have broad impact. Second, the specific issue raised in *Villegas* arises in numerous Hague Convention cases. Third, reciprocity is vital to the efficacy of the Hague Convention.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED GIVEN THE BREADTH AND SIGNIFICANCE OF THE CHILD ABDUCTION PROBLEM

The problem of cross-border child abduction affects hundreds of families each year in the United States. Beginning in the late 1970s, an increase in international family relationships, coupled with the relative ease and accessibility of international travel, resulted in a surge of cross-border parental abductions.[9] By way of illustration, in 1988 alone, when the United States implemented the Hague Convention, approximately 515 children in the United States were victims of international parental abductions, an increase of more than sixty percent from the previous year.[10] During the 1980s, only ten percent of children abducted by a parent from the United States were located.[11] According to the statistics and data compiled by NCMEC and reported by the United States

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[9] *United States Response to International Parental Abduction: Hearing Before the Committee on Foreign Relations*, 105th Cong. 22-28 (1998) (testimony of Catherine Meyer).

[10] *See* Antoinette Passanante, *International Parental Kidnapping: The Call for an Increased Federal Response*, 34 Colum. J. Transnat'l L. 677, 678 (1996).

[11] Susan E. Spangler, *Snatching Legislative Power: The Justice Department's Refusal to Enforce the Parental Kidnapping Prevention Act*, 73 J. Crim. L. & Criminology 1176, 1176 (1985).

Department of State in its annual report on compliance with the Hague Convention, since 2004 the number of parents seeking the return of their abducted children under the Hague Convention has increased every year:

- In 2004, 154 "outgoing applications" were filed by United States parents seeking return of their children who had been abducted abroad.[12]
- In 2005, 288 outgoing applications were filed and 151 children were successfully returned to their country of habitual residence.[13]
- In 2006, 289 outgoing applications were filed and 260 children were returned. Additionally, 346 "incoming applications" were filed by foreign parents seeking return of their children who had been abducted to the United States, with 183 children returned.[14]
- In 2007, 575 outgoing applications were filed and 341 children were returned; and 355 incoming applications were filed and 262 children were returned.[15]

NCMEC's internal statistics show a corresponding rise in international abduction cases. NCMEC's case database lists 665 affected children during the April 2004 to April 2005 time period. From April 2005 to April 2006, that number increased to 823 children.

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[12] U.S. Dep't of State, 2004 Report on Compliance with the Hague Convention ("Compliance Report") (Apr. 2005).

[13] Compliance Report (Apr. 2006).

[14] Compliance Report (Apr. 2007). NCMEC did not begin tracking incoming Hague Convention applications until 2006.

[15] Compliance Report (Apr. 2008).

This upward trend continued during the period from April 2006 to April 2007 (978 children) and the period from April 2007 to April 2008 (1,097 children).

Since the Hague Convention was enacted, the number of abducted children successfully returned to their countries of habitual residence has significantly increased and the Hague Convention has likely deterred thousands of abductions.[16]

The United States actively encourages countries to accede to the Hague Convention, recognizing its potential effectiveness not only in resolving existing cases of parental abduction, but also in deterring future abductions.[17] The Hague Convention thus serves a critical purpose in addressing a problem of profound importance to thousands of parents and children.

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[16] Statement of Maura Harty, Assistant Secretary, Bureau of Consular Affairs, Before the Subcommittee on Human Rights and Wellness Committee on House Government Reform, July 9, 2003, available at http://travel.state.gov/law/legal/testimony/testimony_802.html.

[17] Letter of Submittal from George P. Schultz (Oct. 4, 1985), reprinted in 51 Fed. Reg. 10,494, 10,496 (1986) ("Indeed, while it is hoped that the convention will be effective in returning children in individual cases, the full extent of its success may never b[e] quantifiable as an untold number of potential parental kidnappings may have been deterred."). The United States Department of State currently recognizes sixty-eight countries as treaty partners. U.S. Dep't of State, Hague Abduction Convention Country List, available at http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html.

II. THE "RIGHTS OF CUSTODY" AT ISSUE IN *VILLEGAS* FREQUENTLY ARISE UNDER THE HAGUE CONVENTION

A. How Courts Determine "Rights of Custody"

The issue presented in *Villegas* on appeal to the Second Circuit was whether the Petitioner had "rights of custody" over his daughter necessary to invoke the Hague Convention's remedy of return of the child. (Pet. for Cert., Appendix A at 8a-10a.) Making this determination presents a difficult task for courts, and inconsistency has resulted.

In 1988, Congress implemented the Hague Convention by enacting the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 *et seq.* (2000). The Hague Convention and ICARA create a jurisdictional mechanism for resolving cross-border abduction disputes while also prohibiting courts from deciding the merits of the underlying custody disputes. Hague Convention art. 19; 42 U.S.C. § 11601(b)(4).

Under the Convention, the removal of a child is considered "wrongful" where it is "in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident[.]" Hague Convention art. 3. The Convention does not provide a specific or exhaustive list of the parental rights and obligations that constitute "rights of custody" under the Convention. Article 5 states that "rights of custody" shall "include rights relating to the care of the person of the child, and, in particular, the right to determine the child's place of residence." Hague Convention art. 5.

Trial courts must therefore determine whether the Petitioner has sufficient rights and obligations "under the law of the State in which the child was habitually resident[ ]" to give rise to "rights of custody," consistent with the general definition of that term in the Convention. Hague Convention art. 3.

The contracting states recognized that determining the meaning and content of a foreign State's custody laws would present a difficulty for trial courts. The Hague Convention requires each contracting state to designate a Central Authority to take "all appropriate measures" to "provide information of a general character as to the law of their State in connection with the application of the Convention." Hague Convention art. 7(e). A Central Authority may do this by providing a "certificate or an affidavit . . . concerning the relevant law of that State" to accompany an application for assistance in securing return of a child. Hague Convention art. 8(f). The Central Authorities may also, if practicable, help applicants obtain "a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention." Hague Convention art. 15.

Neither the Convention nor ICARA explicitly states what deference a court is to give to statements submitted by Central Authorities concerning the meaning of their countries' custody laws. That omission has led courts within the United States to approach the question inconsistently, giving rise to the petition now before this Court.

B. The Second Circuit Substituted Its View of Chilean Custody Law for the Chilean Central Authority's Statement of the Meaning of Its Own Custody Law

In *Villegas*, the Chilean Central Authority provided an affidavit that explained that the Petitioner and Respondent shared the right to make "decisions of major importance" regarding their daughter, because both parents were responsible for her well-being. (Pet. for Cert, Appendix E at 37a.) The Authority stated that the Petitioner had rights of custody, which, under Chilean law, include the personal care of the minor, the right to prohibit the minor's exit from the country,[18] and *patria potestas*. (*See id.* at 34a-36a.) *Patria potestas* is a concept recognized in many contracting states by which both natural parents automatically have rights constituting custody. *See infra* II.C. The district court, however, disregarded the Chilean Central Authority's statement of its country's law, instead reaching its own determination as to the meaning of rights afforded under Chilean law, and concluding that the Petitioner had only "rights of access" under the laws of Chile. The Second Circuit reviewed the district court's decision *de novo*, and affirmed, failing to hold that the rights identified in the affidavit amounted to rights of custody. (Pet. for Cert., Appendix A at 12a.)

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[18] The related issue of whether such a *ne exeat* right, standing alone, constitutes a "right of custody" under the Hague Convention is currently presented in the petition for writ for certiorari in *Abbott v. Abbott*, 542 F.3d 1081 (5th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3308 (U.S. Nov. 14, 2008) (No. 08-645). pending before this Court. In *Villegas*, the court below not only rejected the *ne exeat* right as a basis of "custody," but also failed to recognize any of the other rights identified by the Chilean Central Authority.

In affirming the district court's ruling, the Second Circuit specifically held that deference need not be given to an authoritative statement of the Central Authority of another sovereign:

> Even if [the Chilean Central Authority's affidavit] is authoritative, the district court was not bound to follow it.

(Pet. for Cert., Appendix A at 10a.)

This conflicts with the deference other courts have given to a foreign sovereign's statement of its own law when making the threshold determination of "rights of custody."[19] Other United States courts have recognized that when determining whether a removal or retention was wrongful, a contracting state's determination of its own domestic law must be given deference, not only because of general principles of comity, but also because of "factors unique to the Hague Convention." *Navani v. Shahani*, 496 F.3d 1121, 1128 (10th Cir. 2007); *see also Bader v. Kramer*, 484 F.3d 666, 671 (4th Cir. 2007) (noting that a foreign tribunal's determination of whether a parent was exercising "custody rights" will normally be "conclusive"). In *Navani*, the Tenth Circuit reasoned

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[19] As detailed below in Section II.C, the *Villegas* court's holding that *patria potestas* rights do not constitute rights of custody conflicts with determinations made by other courts, demonstrating the inconsistency that results from utilizing different standards of deference. *See, e.g.*, *Altamiranda Vale v. Avila*, 538 F.3d 581, 587 (7th Cir. 2008) (Posner, J.) (in interpreting Venezuelan law, holding that broad definition of "rights of custody" in the Convention is met by "[t]he rights and duties of *patria potestas*, [which] are so extensive that a parent given them is thereby denoted a fit custodial parent (as may not be the case when the parent is merely given the right of *ne exeat*)").

that the "whole structure of the Convention depend[s] on the institutions of the abducted-to state generally deferring to the forum of the child's home state." *Navani*, 496 F.3d at 1129. Although the court in *Navani* decided the wrongful removal issue on the basis of a custody order, rather than by operation of law, the degree of deference required should remain the same when a custody determination is based on operation of law and an appropriate Central Authority provides a definitive explanation of the applicable domestic custody law. In the instant case, as Judge Wesley noted in his dissent, "it is not clear from the district court's decision whether it gave *any* deference at all to the Central Authority's interpretation of Chilean law." (Pet. for Cert., Appendix A at 17a (emphasis in original).) The decision affirming the district court's ruling is thus inconsistent with other courts' approach to the Hague Convention.

C. The Rights at Issue in *Villegas* Arise Frequently Under the Hague Convention Because the Specific Right of *Patria Potestas* Exists by Operation of Law in Numerous Contracting States

Whether a petitioner has "rights of custody" under the laws of the state of a child's habitual residence is a relatively straightforward determination where there is an agreement between the parties or a judicial ruling awarding custody. But in a large number of cases brought under the Hague Convention, there is no agreement and the abduction occurs before a ruling on custody.[20] That was the circums-

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[20] Elisa Perez-Vera, *Explanatory Report: Hague Conference on Private International Law*, in 3 Acts and Documents of the Fourteenth Session 426 (1980) ("Perez-Vera Report"); *see also* National Center for Missing and Exploited Children, *Litigating*

tance in *Villegas*. Many Hague Convention cases thus require a determination of whether "rights of custody" exist in foreign states by "operation of law."

Many member states recognize some form of operation-of-law custody rights,[21] including the five countries with the most reported abductions to the United States: Mexico, the United Kingdom, Germany, Canada, and Australia.[22] These laws are often unfamiliar to United States judges, and they may differ significantly from country to country or even within the same country where there are variations across provinces or states.[23] In such cases, a district

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International Child Abduction Cases Under the Hague Convention 19 (2007).

[21] *See, e.g.*, Australian Family Law Act 1975 §§ 61C, 111B; Danish Act on Parental Responsibility ch. 2, § 7; Greek Civil Code art. 1510; Lithuanian Civil Code § 3.165; Malta Civil Code tit. II, ch. 16, subtit. I-3B; New Zealand Care of Children Act 2004 § 17; Polish Code of Family Law of 1964 art. 93, § 1; Spanish Civil Code art. 156; Swedish Children and Parents Code ch. 6, § 3; United Kingdom's Children's Act of 1989 ch. 41, Part I, § 4.

[22] *See* Compliance Report at 5 (Apr. 2008).

[23] *Compare* New Zealand Care of Children Act § 17 (father and mother are joint guardians absent certain circumstances) *to* Swedish Children and Parents Code ch. 6 § 3 (parents both have custody if married to each other; otherwise the mother has sole custody); *compare* Polish Code of Family Law of 1964 art. 93, § 1 (the child's mother has sole custody unless there is an establishment of paternity) *to* Greek Civil Code art. 1510 (father and mother share joint custody unless special circumstances, such as the declaration of absence or decline of parental custody apply); *compare* Lithuanian Civil Code § 3.165 (both parents have equal rights whether the child is born to a married or unmarried couple, after divorce or after judicial nullification of the marriage) *to* United Kingdom's Children's Act of 1989 ch. 41, part I, § 4 (if the parents are unmarried the child's mother

court must understand the scope of parental rights afforded under the applicable foreign law. *See Whallon v. Lynn*, 230 F.3d 450, 456-57 n.7 (1st Cir. 2000) (stating that a case involving the Mexican operation-of-law doctrine *patria potestas* "highlights the difficulties in imposing Anglo-American definitions of custody on legal systems, like Mexico's, that have different origins and traditions").

One of the specific rights raised in *Villegas* arises with notable regularity – the right of *patria potestas*. A large number of signatory countries recognize the right, including Mexico, Argentina, Cuba, Colombia, Panama, Spain, and Venezuela.[24] Several United States federal courts have held – contrary to the *Villegas* court – that *patria potestas* confers "rights of

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has sole custody unless the father petitions for custody or the father and mother enter a parental responsibility agreement).

[24] *See, e.g.*, *Altamiranda Vale*, 538 F.3d at 584 (Venezuela recognizes *patria potestas* in "Ley Orgánica para la Protección del Niño y del Adolescente [Organic Law for the Protection of Children and Adolescents], tit. IV, ch. 2, § 1, art. 347"); *Moreno v. Martin*, No. 08-22432-CIV, 2008 WL 4716958, at *8 (S.D. Fla. Oct. 23, 2008) ("Under Spanish law, parental authority ('*patria potestad*') includes the right to make decisions regarding a child's education, well-being, protection, upbringing, and place of residence."); *Aguirre v. Calle*, No. 08-CV-2613, 2008 WL 4461931, at *5 (E.D.N.Y. Oct. 3, 2008) (stating that "Title XIV of the Colombian Civil Code sets forth the rights of 'Patria Potestas'"); *Lalo v. Malca*, 318 F. Supp. 2d 1152, 1155 (S.D. Fla. 2004) (stating that Article 319 of Panama's Code of Minors recognizes *patria potestas*); *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1277-78 (N.D. Ga. 2004) (Argentine Civil Code article 264 recognizes "the legal concept of *patria potestas*"); *Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1184 (S.D. Fla. 2000) (*patria potestas* is recognized under Cuban law in "Código de familia. Ley 1,289 of 14 Feb 1975 in *Gaceta oficial* 15 Feb 1975"), *aff'd*, 212 F.3d 1338 (11th Cir. 2000).

custody."[25] That Chile's operation-of-law custody rights, as identified in the affidavit of the Chilean Central Authority, were not held to constitute "rights of custody" under the Hague Convention demonstrates the need to adopt a consistent approach to statements of foreign Central Authorities regarding their domestic custody laws in Hague Convention return cases. Given the prevalence of the specific rights at issue in *Villegas*, this issue has recurring significance.

III. RECIPROCITY AND DEFERENCE TO THE CUSTODY LAWS OF THE STATE OF HABITUAL RESIDENCE ARE REQUIRED TO ENSURE THE EFFICACY OF THE HAGUE CONVENTION

This Court has long recognized that "international law is founded upon mutuality and reciprocity." *Hilton v. Guyot,* 159 U.S. 113, 168 (1895). Each contracting state benefits from the Convention insofar as other contracting states fairly apply it – only then is there a benefit to the bargain. Because there is no supra-national tribunal to resolve controversies on the Convention's application, "the effectiveness of the Convention is left in the hands of the respective Central Authorities and the national courts that implement and interpret the Convention." Linda Silberman, *Interpreting the Hague Abduction Con-*

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[25] *See Altamiranda Vale*, 538 F.3d at 586 (holding that, under Venezuelan law, a parent's rights relating to the care of the person of the child under the doctrine of *patria potestas* established the parent's rights of custody); *Aguirre*, 2008 WL 4461931, at *4-5 (noting that *patria potestas* rights apply through operation of law, and further holding that *patria potestas* rights confer "custody" within meaning of Hague Convention); *Moreno*, 2008 WL 4716958, at *9.

vention: In Search of a Global Jurisprudence, 38 U.C. Davis L. Rev. 1049, 1057 (2005). Noncompliance is likely to beget further noncompliance by other contracting states.

Recognizing the importance of compliance of all contracting states to the effective operation of the Convention, the United States Department of State reports annually on Hague Convention compliance. Pub. Law. 105-277 § 2803 (as amended). In its most recent report, the Department identified nine contracting states, the judiciaries of which are improperly or inconsistently interpreting and enforcing the Convention. Compliance Report at 7-18 (Apr. 2008). The same proper and consistent enforcement of the Convention is required of the United States courts.

The decision below undermines the reciprocity essential to the operation of the Convention. The Hague Convention is predicated on the principle that "a child's country of habitual residence is best placed to decide upon questions of custody and access." *Whallon*, 230 F.3d at 456; *see also* Hague Convention art. 1. Contracting states are required to "trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it." *Blondin v. Dubois*, 189 F.3d 240, 248-49 (2d Cir. 1999); *accord Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996).

Permitting trial courts in the United States to substitute at their discretion their interpretation of a foreign State's custody laws for the authoritative statements submitted by that State undermines the principles of reciprocity and mutual deference upon which the viability of the Convention rests. In implementing the Convention, Congress intended that the

Convention be enforced in the United States as the Convention is expected to be enforced abroad.

CONCLUSION

For the reasons set forth above, NCMEC respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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March 13, 2009

PETITION FOR RE-HEARING

Supreme Court, U.S.
FILED
JUN 17 2010
OFFICE OF THE CLERK

No. 08-775.

In The Supreme Court of The United States

HUGO ALEJANDRO VILLEGAS DURAN,

Petitioner,

v.

JOHANA IVETTE ARRIBADA BEAUMONT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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JUN 16 2010

The undersigned counsel hereby certifies that the foregoing Petition for Rehearing is restricted to the grounds specified in Rule 44 of the Supreme Court Rules and is presented in good faith and not for delay.

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QUESTION PRESENTED

Where a parent has a ne exeat right, which this court held in *Abbott v. Abbott,* 560 U.S.__(2010) is a "right of custody," must the parent still establish, as part of his "*prima facie*" case for return of the child, that "rights of custody" were "actually exercised" by him at the time of the wrongful retention or removal?

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PETITION FOR REHEARING*

On May 24, 2010, this Court, by Summary disposition, granted the Petition for a Writ of Certiorari, vacated the judgment and remanded the case to the United States Court of Appeals for the Second Circuit for further consideration in light of *Abbott v. Abbott,* 560 U.S.__(2010). Respondent moves for a Rehearing of the Summary disposition and requests that upon Rehearing the judgment be affirmed.

It is respectfully submitted that Rehearing is required because this court's determination in *Abbott v. Abbott, supra,* would not change the result.

STATEMENT OF THE CASE

While the Petition for a writ of certiorari was pending, this court rendered an opinion in *Abbott v. Abbott*, 560 U.S. __, 2010 WL 1946730. In that opinion Justice Kennedy held that the father's *ne exeat* right granted by Chilean law was a "right of custody," under the Hague Convention, abrogating *Croll v. Croll,* 229 F.3d 133 (2d Cir. 2000), *Fawcett v.*

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*Page number preceded by "A" refers to the "Joint Appendix" and the "Supplemental Joint Appendix." Page number preceded by "SPA" refers to the "Special Appendix." Page numbers preceded by "PB" refer to Petitioners Brief, by "RB" refer to Respondents Brief, and by "PRB" refer to Petitioners Reply Brief in the Court of Appeals; Respondent Johana Ivette Arribada Beaumont is referred to as "Johana."

McRoberts, 326 F.3d 491 (4th Cir. 2003), and *Gonzalez v. Gutierrez,* 311 F.3d 942 (9th Cir. 2002).

Justice Kennedy found that the consent provision in Minors Law 16,618 conferred upon the father the joint right to determine his child's country of residence. See Minors Law 16,618, art. 49 (Chile). The Court held that this is a right of custody under the Convention.

Significantly, Justice Kennedy indicated that while a parent possessing a *ne exeat* right has a right of custody and may seek a return remedy, a return order is not automatic. Return is not required if the abducting parent can establish that a Convention exception applies. He noted that "[T]he 'proper interpretation and application'" of the Article 13 (b) and other exceptions were not before the Court.

A rehearing is sought by Respondent because, in this case, the Petitioner did not argue in the district court, or in the Court of Appeals, that he had a *ne exeat* right, which was a right of custody.[1] More important, this case involves questions not before this Court in *Abbott, supra,* and not addressed in Respondents opposing Brief because it was not raised as an issue by the Petition for Certiorari.

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[1]He laments in his Petition for Certiorari that the majority in the Court of Appeals ignored his argument regarding the letter from the employee of the Chilean Authority, and attempted to construe the Chilean civil code on its own. (PB 8)

The Respondent submits that although the Petitioner's *ne exeat* right grants him a right of custody, the judgment should still be affirmed because there is no competent evidence in the record to establish that "rights of custody" were "actually exercised" by him. Mr. Villegas failed to establish this element of his "*prima facie*" case. See Art. 3; 42 U.S.C. § 11603(e)(1)(A); *Gitter v. Gitter,* 396 F.3d 124 (2d Cir. 2005) at 130-131. The petitioner did not testify, called no witnesses and did not offer any evidence on this issue before the district court. His entire case was limited to oral argument of his attorney, based mostly upon inadmissible hearsay. It was because of this lack of evidence that the district court found that Mr. Villegas was not "actually exercising" rights of custody at the time of the retention. (SPA 75-80)

Moreover, the Petitioner made a new argument in the Court of Appeals, one which he did not make in the district court. This argument was that the Court should construe the issue of "actual exercise" of rights of custody, in accordance with the approach of the Sixth Circuit in *Friedrich v. Friedrich,* 78 F.3d 1060 (6th Cir. 1996). That court held that if a person has valid custody rights to a child under the law of the country of the child's habitual residence that person cannot fail to "exercise" those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child. *Id.* at 1065-66 (footnote omitted)

Assuming this case was sent back to the United States Court of Appeals for the Second Circuit for

further consideration in light of *Abbott v. Abbott,* 560 U.S.__(2010) there would still be no evidence in the record to enable it to render any decision other than to affirm the judgment of the district court.

THE PETITION AND ANSWER

This action was commenced on July 25, 2006, by the filing of an Order to Show Cause and Petition (A-8-14). In his Petition Mr. Villegas alleged, *inter alia,* that he paid the tuition for the child's preschool, contributed monthly alimony, paid for the child's health insurance and visited her regularly (Petition, par. 12; A-10).

Two days later, on July 28, 2006, without leave of court, Carolyn Musalem, Mr. Villegas' attorney, filed with the court her own affidavit in support of the petition, dated July 25, 2006 (A-19-101) which contained numerous attachments.

The statements in Mr. Villegas' Petition that he "continued to maintain a relationship with Valentina and to support her financially, including paying for Valentina's medical examinations" and "continued to provide his daughter with emotional and monetary support" was denied by Johana in her response to the petition. (A-284-286). Johana asserted, among other things, that she had custody of the child under a Chilean Court order of the court dated July 13, 2005. She argued that since this order was not submitted to the Chilean Central Authority, its opinion, which was

submitted to the court by Petitioner, was made without considering it. (A-217)

Johana further asserted that Mr. Villegas was not actually exercising rights of custody at the time of the removal. She asserted that he was visiting the child one day a week and did not pay any child support until she brought an action for child support on December 13, 2004. Although the Court awarded her child support, Mr. Villegas failed to make regular payments (A-284-286).

On August 29, 2006, without leave of court, Mr. Villegas' other attorney, Joshua Brook, filed an affidavit in support of the Petition.(A-162 -175)

THE HEARING AND DECISION OF THE DISTRICT COURT

A hearing was held before the district court on August 31, 2006. (SPA -1-88) At the outset the court asked the parties how they would like to proceed. Mr. Villegas' attorney was silent on this issue. Johana's counsel asked if he could call a witness out of turn, and it was agreed that he would be allowed to call a witness out of turn. (SPA-2-3)

At the conclusion of direct examination the witness was cross examined by Mr. Villegas' attorney (SPA-58 - 81) who offered into evidence the deposition of the witness, which had been taken the day before (Petitioners Exhibit 1; SPA-58) and Article 229 of the Chilean Civil Code. (Petitioners Exhibit 2; SPA-68) Both

exhibits were admitted into evidence without objection. He also offered into evidence the certificate of the Chilean court dated August 18, 2006 (SPA-37; A-221; Respondents Exhibit 3). Judge Robinson took judicial notice of a September 30, 2004 Order of the Chilean Court (A-90-92; SPA-72); a December 3, 2004 order of the Chilean Court (SPA-47-48); and a July 13, 2005 order of the Chilean Court (SPA-48; SPA-39). During the witness testimony Judge Robinson took judicial notice (SPA-32) of Section 225 of the Chilean Civil Code. (Art. 14)

The witness was cross-examined by Mr. Villegas' attorney with regard to the contents of the January 17, 2006 opinion letter of an employee of the Chilean Central Authority (SPA-53). This letter was not offered into evidence, nor was it obtained at the request of the court, in accordance with Article 15.

Mr. Villegas was not present in court for any of the proceedings. He did not testify. His Petition was not offered into evidence at the hearing (See Art. 30). He did not call any witnesses to testify. His entire case was based upon the oral argument of his attorney[2] and the documents admitted into evidence at the hearing.[3]

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[2] Mr. Villegas' attorney took on the dual rule of attorney and unsworn witness for his client. During the hearing he referred to the affidavit his associate had filed with the court as though it were in evidence.

[3] The Convention does not eliminate due process requirements. The Federal Rules of Civil Procedure govern the procedure in the United States district courts in all suits of a civil nature. Fed. R. Civ. P. 1. The Federal Rules of Evidence apply to Hague Convention proceedings. Fed. R. Evid. 1101(b).

Mr. Villegas' attorney argued that Mr. Villegas had default rights of custody under the operation of Chilean statutory law. He contended that Article 229 of the Chilean Code, which "imposes a duty" upon Mr. Villegas to maintain a direct and permanent relationship with the child, is a right of custody (Petition, 22a; SPA-74-80).

After hearing argument, the district court ruled that Mr. Villegas was not actually exercising rights of custody. Judge Robinson stated:

> I haven't seen a single piece of evidence that [Petitioner has] done any of the habitual parental exercises of discretion that would allow me to say he was exercising joint custody as the Convention defines it, much less as we define it. (SPA-77-78).

Judge Robinson dismissed the petition, finding *inter alia*, that Petitioner's rights under Chilean Law were "rights of access." (SPA-81-83)

SECOND CIRCUIT COURT OF APPEALS MAJORITY OPINION

On July 18, 2008, the Second Circuit affirmed the judgment of the district court. See Appendix A; *Villegas Duran v. Arribada Beaumont,* 534 F.3d 142 (2d Cir. 2008).

In its decision the court found that under Chilean law, when parents live separately, the responsibility for the personal care of their child rests with the mother. (Citing Code Civil Section 225 (Chile)). However, the other parent still has a *ne exeat* right: the right to determine whether the child will leave the country. (Citing Minors Law 16,618 art. 49). 534 F.3d at 147.

The majority stated that in interpreting the Hague Convention, it had held that violating a ne exeat right is insufficient to qualify as a violation of custodial rights. (Citing *Croll v. Croll,* 229 F.3d at 138-140). 534 F.3d at 147. It concluded that Article 229 of the Chilean Civil Code addresses visitation rights only and not rights to care for the child under a custodial relationship, and that Petitioner did not have rights of custody. 534 F.3d at 149.

The Second Circuit held that the bundle of rights Mr. Villegas laid claim to did not create rights of custody under the Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 U.N.T.S. 49 ("Convention"), and the International Child Abduction Remedies Act, 42 U.S.C. 11601 *et seq.* ("ICARA"). 534 F.3d at 149.

In Point II of Petitioners Brief he posed the following question: "2. Did the District Court err by failing to find that the father was exercising his Chilean rights of custody at the time of the abduction of the child from Chile by the mother?" (RB- 2)

In that Point Petitioner argued that the District Court erroneously ruled that Mr. Villegas was not actually exercising rights of custody when it held: "I haven't seen a single piece of evidence that [Petitioner has] done any of the habitual parental exercises of discretion that would allow me to say he was exercising joint custody as the Convention defines it, much less as we define it." (SPA-77 -78; RB-17-18).

He urged the Court to construe the issue of "actual exercise" of rights of custody, in accordance with the approach of the Sixth Circuit in *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996). (RB-17-18)

Petitioner argued in Point II of his Brief (without any evidentiary support in the record) that before Valentina's abduction by the Respondent and despite the separation between the parents, Petitioner contributed to her upbringing both materially and emotionally. He argued that "According to a social workers report that was presented to the District Court, Petitioner paid for Valentina's medical examinations and other expenses" (A-67). He concluded that the Court should hold that these activities were sufficient to establish that Petitioner was actually exercising his rights of custody. (RB-17-18)

The Respondent replied in her brief that no evidence was offered to establish that Mr. Villegas was actually exercising rights of custody, at the time of the retention. She pointed out that he improperly relied upon the December 16, 2005 letter from the social

worker, which was attached to the affidavit of his attorney, was hearsay, and was not offered into or admitted into evidence, to support the argument that he was exercising rights of custody. (RB-30-32)

In his Reply Brief, the Petitioner repeated these same arguments. (RB-8)

The Second Circuit did not address this Point in its opinion affirming the judgment of the district court. *Villegas Duran v. Arribada Beaumont,* 534 F.3d 142 (2d Cir. 2008).

ARGUMENT

REHEARING SHOULD BE GRANTED AND THE PETITION SHOULD BE DENIED BECAUSE THIS COURTS HOLDING IN *ABBOTT V. ABBOTT* WOULD NOT CHANGE THE RESULT WHERE THERE WAS NO EVIDENCE IN THE RECORD THAT PETITIONER ACTUALLY EXERCISED RIGHTS OF CUSTODY RIGHTS AT THE TIME OF THE CHILD'S RETENTION

Article 3 of the Convention provides, in part, that

> The removal or the retention of a child is to be considered wrongful where--(a) it is in breach of rights of custody attributed to a person, . . . under the law of the State in which the child was habitually resident immediately before the removal

> or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

An apparent conflict in the Convention is that petitioner must establish that he "actually exercised" rights of custody as part of his "*prima facie*" case, and the respondent may establish that he is not "actually exercising" those rights as a defense to return.

Article 13 (a) of the Convention contains limitations on the return obligation. Under Article 13(a), the judicial authority may deny an application for the return of a child if the person having the care of the child was not actually exercising the custody rights at the time of the removal or retention, or had consented to or acquiesced in the removal or retention.

The petitioner must demonstrate a *prima facie* case by a preponderance of the evidence. 42 U.S.C. § 11603(e)(1)(A). The elements of a *prima facie* case are enumerated in Articles 3 and 4 of the Hague Convention. Thus, courts have recognized that a petitioner establishes a *prima facie* case if he or she proves three elements: (1) prior to removal or wrongful retention, the child was habitually resident in a foreign country; (2) the removal or retention was in breach of custody rights under the foreign country's law; and (3) the petitioner actually was exercising custody rights at the time of the removal or wrongful

retention. See Art. 3; 42 U.S.C. § 11603(e)(1)(A); *Gitter v. Gitter,* 396 F.3d 124 at 130-131.

Here, the Petitioners entire case was based upon the arguments of his attorney and the few documents admitted into evidence, none of which related to the issue of "actually exercised." The district court found that Petitioner did not establish that he was actually exercising rights of custody. See 42 U.S.C. 11603 (e)(1)(A).

In *Abbott,* this court did not address the question of whether the parent who has the *ne exeat* right must still establish, as part of his "*prima facie*" case for return, that "rights of custody" were being "actually exercised" by him at the time of the wrongful retention or removal. However, it did specifically state that the Article 13 (a) exception, that the parent "was not actually exercising the custody rights at the time of the removal or retention," still applies, where that parent has a *ne exeat* right of custody. Notably, Justice Kennedy stated that "a return order is not automatic" and "return is not required if the abducting parent can establish that a Convention exception applies."

In view of the lack of record evidence to support Petitioner's argument that he "actually exercised" rights of custody at the time of the retention, the determination in *Abbott,* would not change the result.

CONCLUSION

By reason of the foregoing, the petition for rehearing should be granted, and the judgment below should be affirmed.

Respectfully submitted,

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